

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 200

ORDER OF RAILWAY CONDUCTORS OF AMERICA,
H. W. FRASER, AS PRESIDENT OF THE ORDER
OF RAILWAY CONDUCTORS OF AMERICA, ETC.,
ET AL., PETITIONERS,

VS.

THE PENNSYLVANIA RAILROAD COMPANY, AND
BROTHERHOOD OF RAILROAD TRAINMEN

AN WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED JUNE 26, 1944

CERTIORARI GRANTED OCTOBER 9, 1944

APPENDIX TO APPELLANTS BRIEF
IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA.
OCTOBER TERM, 1943

No. 8571

ORDER OF RAILWAY CONDUCTORS OF AMERICA;
H. W. FRASER as President of the Order of Railway
Conductors of America, Room 312, 10 Independence
Avenue, S. W., Washington, D. C.; B. C. JOHNSON as
Vice President of the Order of Railway Conductors of
America, Room 312, 10 Independence Avenue, S. W.,
Washington, D. C., *et al*, Appellants,

v.

NATIONAL MEDIATION BOARD, GEORGE A. COOK, WIL-
LIAM H. LEISERSON and E. H. SCHWARTZ, indi-
vidually and as members of the National Mediation Board,
18th and F Sts., N. W., Washington, D. C., *et al*,
Appellees.

Appeal from the District Court of the United States for the
District of Columbia

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IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

ORDER OF RAILWAY CONDUCTORS OF AMERICA; H. W. FRASER as President of the Order of Railway Conductors of America, Room 312, 10 Independence Avenue, S. W., Washington, D. C.; B. C. JOHNSON as Vice President of the Order of Railway Conductors of America, Room 312, 10 Independence Avenue, S. W., Washington, D. C.; E. E. KALKMAN as General Chairman of the General Committee of Adjustment of the Order of Railway Conductors of America on The Pennsylvania Railroad for the Lines West, Room 312, 10 Independence Avenue, S. W., Washington, D. C.; and J. E. MAGILL as General Chairman of the General Committee of Adjustment of the Order of Railway Conductors of America on the Pennsylvania Railroad for the Lines East, Room 312, 10 Independence Avenue, S. W., Washington, D. C., *Plaintiffs,*

Civil Action
No. 17,899

vs.

NATIONAL MEDIATION BOARD, GEORGE A. COOK and DAVID J. LEWIS individually and as members of the National Mediation Board, 18th and F Streets, N. W., Washington, D. C.; **PENNSYLVANIA RAILROAD COMPANY,** 626 14th Street, N. W., Washington, D. C.; **BALTIMORE AND EASTERN RAILROAD COMPANY,** 626 14th Street, N. W., Washington, D. C.; and **BROTHERHOOD OF RAILROAD TRAINMEN,** Room 400, 10 Independence Avenue, S. W., Washington, D. C., *Defendants.*

**AMENDED COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF
COUNT I**

Come now the plaintiffs in the above-entitled case and, for cause of action, respectfully state as follows:

1. That the plaintiff, Order of Railway Conductors of America (hereinafter sometimes referred to as "ORC"), is a voluntary unincorporated association, having its headquarters and general offices at Cedar Rapids, Iowa; that its membership consists of many thousands of railroad conductors throughout the United States and Canada; that it has a written constitution and statutes, a representative form of government, is not organized for profit, and is a railway labor union, national in scope.

2. That the plaintiff, H. W. Fraser, is a member and President of said ORC, and a resident of Cedar Rapids, Iowa; that the plaintiff, B. C. Johnson, is a member and Vice President of said ORC, and a resident of Grand Rapids, Michigan; that the plaintiff, C. E. Kalkman, is a member of said ORC, is the General Chairman of the General Committee of Adjustment of the ORC on the Pennsylvania Railroad for the lines of said railroad west of Pittsburgh, Erie, and Buffalo (those lines being sometimes hereinafter referred to as "Lines West"), and is a resident of Canton, Ohio; that the Plaintiff, J. E. Magill, is a member of said ORC, is General Chairman of the General Committee of Adjustment of the ORC on the Pennsylvania Railroad for the lines east of Pittsburgh, Erie, and Buffalo (those lines being sometimes hereinafter referred to as "Lines East"), and is a resident of Philadelphia, Pennsylvania.

3. That upon the Pennsylvania Railroad, both Lines East and Lines West, there are located, usually at division points on said railroad, what are known as local

divisions of the ORC; that each local division having members who are employees of the Pennsylvania Railroad elects a Local Committee of Adjustment, and a Local Chairman thereof.

That under the constitution and statutes of the ORC, the Local Chairmen of the various Local Committees of Adjustment on the Lines West constitute the membership of what is known as the General Committee of Adjustment, which said General Committee of Adjustment, in turn, has a General Chairman; who, as above alleged, for the Lines West is the said C. E. Kalkman.

That the Local Chairman of the various Local Committees of Adjustment on the Lines East on the Pennsylvania Railroad, under the constitution and statutes of the ORC, constitute the General Committee of Adjustment of the ORC on the Lines East, which has a General Chairman, who, as above alleged, is the said J. E. Magill.

That the railroad conductors on the Baltimore and Eastern Railroad are represented by the General Chairman of the General Committee of Adjustment for the Lines East.

4. That the defendant, Pennsylvania Railroad Company (sometimes hereinafter referred to as the "Penn RR") is a corporate common carrier within the provisions of the Railway Labor Act, and is a corporation, incorporated under the laws of the State of Pennsylvania, and having its principal office in Philadelphia, Pennsylvania, and that it operates a line of railway as a common carrier within the District of Columbia.

5. That the Baltimore and Eastern Railroad Company (sometimes hereinafter referred to as the "B&E RR") is a corporate common carrier within the provisions of the Railway Labor Act, and is a corporation, incorporated under the laws of the State of Maryland, and having its principal office in Philadelphia, Pennsylvania; that said B&E RR is a wholly-owned sub-

subsidiary of the said Penn RR, and the operation of said B&E RR is under the general management and supervision of said Penn RR.

6. That the defendant, Brotherhood of Railroad Trainmen (sometimes hereinafter referred to as the "BRT"), is a voluntary unincorporated association, having its principal office in the City of Cleveland, Ohio; that it is a labor organization, national in scope, and its membership is composed of many thousands of employees of various railroads throughout the United States and Canada.

7. That the defendant, National Mediation Board (sometimes hereinafter referred to as the "Board"), is an independent agency in the executive branch of the United States Government created by Public Law No. 442, 73rd Congress (45 U.S.C.A., 151 *et seq.*), commonly known as the "Railway Labor Act," of whose seal this Court under the terms of said Act takes notice, with its principal office in the District of Columbia.

8. That the defendant, George A. Cook, is a citizen of the United States, a resident of the District of Columbia, and a member and Chairman of the said Board, and is sued herein as a member of said Board.

9. That the defendant, David J. Lewis, is a citizen of the United States, a resident of the District of Columbia, and a member of the Board, and is sued herein as a member of said Board.

10. That this is a suit of a civil nature which arises under the Constitution and laws of the United States, whereof this Court has original jurisdiction, and particularly under the Act of Congress of May 20, 1926, known as the Railway Labor Act (44 Stat. 577), as amended June 21, 1934, by Public Act No. 442 of the 73rd Congress of the United States, and is a suit for a declaratory judgment under the provisions of the Act of Congress pursuant to the Federal Declaratory Judgment Act (U.S.C. Title 28, Par. 400; 48 Stat. 955), and

the laws relating to interstate commerce, and is instituted pursuant to the provisions of said Railway Labor Act, as amended, and the laws of the United States relating to interstate commerce, and also under the general-equity jurisdiction of this Court.

11. That at this time, and for many years last past, the ORC is and has been the duly accredited and recognized representative and bargaining agent for the class and craft of road conductors on the Penn RR, numbering in excess of one thousand; that the said BRT is the duly accredited and recognized representative and bargaining agent for the class and craft of road brakemen on the Penn RR, as well as for the class and craft of yard conductors, yard brakemen, baggagemen, and switchtenders, numbering in excess of one thousand; that the work of the two classes and crafts, i.e., road conductors and road brakemen, being closely related, the ORC and the BRT on occasions have jointly negotiated contracts or schedules with railroad common carriers with regard to rates of pay, rules, and working conditions; that such a joint schedule was negotiated jointly by the ORC and the BRT with the Penn RR, to be and become effective April 1, 1927, a true and correct copy of said joint schedule being attached hereto, made a part hereof, and marked Exhibit "A"; that said schedule, Exhibit "A" other than as to the rates of pay therein set forth, is still in full force and effect insofar as the ORC, and the class and craft of road conductors, and the defendant, Penn RR, are concerned.

12. That on April 18, 1941, the Penn RR served a notice upon the ORC and the BRT, as the respective recognized representatives of the class and craft of road conductors and road brakemen, of the desire of the management to change certain regulations in said schedule, Exhibit "A", said notice being in compliance with the Railway Labor Act; that thereafter the General Chairmen of the General Committees of Adjust-

ment of the ORC for the Lines West and the Lines East on said Penn RR, jointly met with H. F. Sites, General Chairman of the BRT for the Lines East, and U. D. Hartman, General Chairman of the BRT for the Lines West, and said representatives jointly agreed to enter upon joint negotiations with the said Penn RR to negotiate revised rules and working conditions as theretofore with regard to the two classes and crafts of railway employees, i.e., road conductors and road brakemen; that thereafter joint conferences by said General Chairmen were held with C. E. Musser, H. A. Enochs, Luther Long, I. O. Enders, W. C. Pitman, and other agents and officials of the defendant railroads; that said joint conferences commenced on or about May, 1941, but shortly thereafter were held in abeyance by consent of all concerned until on or about December 5, 1941, when steps were taken to renew the joint conferences; that thereafter the first of such conferences with the representatives of the defendant railroads was held on July 15, 1942.

13. That due to the Lease-Lend Program and the emergency then existing, there had developed a great increase in passenger traffic upon the Penn RR, and passenger trains to accommodate said traffic were composed of so many passenger cars that it became impossible for a single conductor to collect the tickets and fares and perform his duties, and the representatives of the craft of road conductors, to wit, the ORC, had negotiated with the Penn RR for the placing of an additional conductor or conductors upon such heavy passenger trains, and, early in the fall of 1941, as a result of said negotiations, additional road conductors had been placed upon a number of such trains operated by the Penn RR, at conductors' pay.

14. That on or about July 24, 1942, in the joint negotiations with the management of the Penn RR, the said BRT asserted and demanded the right to intrude and

infringe upon the jurisdictional right of the ORC as the representative under the provisions of the Railway Labor Act of the class and craft of road conductors by legislating for the performance of conductors' work on heavy passenger trains, and by legislating and dictating the circumstances under which a Conductors' Extra Board would be maintained, by fixing the number of men that should compose the same; that the representatives of the Penn RR concurred in the position of the BRT; that because of said demands of the BRT, and the acquiescence therein by the Penn RR, the said ORC withdrew from said joint negotiations, and served written notice of its withdrawal on the Penn RR on August 3, 1942, a true and correct copy of which is attached hereto, made a part hereof, and marked Exhibit "B"; that at the same time, the protest of the representative of the class and craft of road conductors with reference to said infringement and encroachment sought to be made upon its right to bargain for the class and craft of road conductors was set forth in a letter served upon the management of the Penn RR, a true and correct copy of which is attached hereto, made a part hereof, and marked Exhibit "C".

15. That on or about August 17, 1942, the said BRT and the Penn RR signed and executed a separate schedule or agreement, incorporating provisions encroaching upon and invading the right of the representative of the class and craft of road conductors with regard to the matters hereinafter set forth, a true and correct copy of said schedule being attached hereto, made a part hereof, and marked Exhibit "D"; that paragraph P-A-1 of said schedule, Exhibit "D", reading as follows:

"P-A-1. Rates for passenger service shall be as follows:

* * * * *

(See page 16, Exhibit "D")

"On passenger trains on which, in the judgment

of the proper officer of the Company, the conductor requires assistance in the collection of tickets and fares, the proper officer of the Company shall designate such number of assistant conductors or ticket collectors as in the judgment of such officer may be necessary to assist the conductor in the collection of the tickets and fares. The assistant conductors or ticket collectors so designated shall, in addition to collecting tickets and fares, perform the work of brakemen or baggagemen as members of the crew and they shall be paid for their entire tour of duty at the applicable rate provided above for assistant conductors or ticket collectors. When qualified assistant conductors or ticket collectors are not available at the time and place when a need for assistance arises, one or more brakemen or baggagemen who have not qualified as assistant conductors or ticket collectors may be designated to assist in the collection of tickets and fares. Brakemen or baggagemen so designated shall be paid for their entire tour of duty at the applicable rate provided above for assistant conductors or ticket collectors, and such payment shall not serve as the basis for any runaround payment or payments to any assistant conductor or ticket collector.

"When, in the judgment of the proper officer of the Company the conductor does not require the assistance of some or all of the assistant conductors or ticket collectors who have been assigned to assist him in accordance with the preceding paragraph of this rule (P-A-1), the assistant conductor or ticket collector assignments which are not required may be abolished." (pp. 16 and 17 of Exhibit "D".)

is void and in violation of the Railway Labor Act, Section 2, First, Second, Third, Fourth, Seventh, and Ninth thereof, to the extent that the same purports and attempts to provide, by a collective bargaining contract

with the BRT, not the duly accredited representative of the class and craft of road conductors on the Penn RR, for the performance of road conductors' work, and, to said extent, constitutes and is an unlawful and illegal infringement upon the exclusive right of the ORC, and its representatives, as the accredited bargaining agent of the class and craft of road conductors, to represent said class and craft in collective bargaining.

16. That simultaneously, and as a part of said written agreement, Exhibit "D", and in connection with the provisions of P-A-1, it was orally agreed by and between the said BRT and the Penn RR that men allegedly working as so-called assistant conductors would qualify by examination, furnish surety bond, be equipped with ticket punches, cash fare receipts, tariffs, and cash reports, and be responsible to the Auditing Department, and do and perform all of the work of a regular road conductor on certain passenger cars on the heavy passenger trains wherein one regular road conductor, because of the heavy traffic, could not perform all of the conductor's duties, and that on September 12, 1942, said Penn RR, in conformity with said understanding and agreement, published certain rules and regulations, a true and correct copy of which is attached hereto, made a part hereof, and marked Exhibit "E".

17. That paragraphs 5-N-5 and 5-N-6 of said schedule, Exhibit "D", reading as follows:

"5-N-5. (a) On seniority districts on which extra road conductor lists are maintained, when the number of road conductors on such a list is reduced, the road conductors displaced as a result thereof, may displace any brakemen, baggagemen, or assistant conductors or ticket collectors whom their seniority entitles them to displace, subject to the provision of Rules 2-C-2 and 2-C-3, provided that:

(1) In the case of road conductors, other than extra passenger conductors, on the extra road conductor list, such conductors are earning an average of less than 2600 miles per month when the list is reduced;

(2) In the case of extra passenger conductors on the extra road conductor list, such conductors are earning an average of less than 4500 miles per month when the list is reduced.

(b) Road conductors reduced to brakemen, baggagemen, or assistant conductors or ticket collectors, in accordance with the foregoing provisions of this rule (5-N-5), shall not be permitted to remain as brakemen, baggagemen, or assistant conductors or ticket collectors when extra road conductors, other than extra passenger conductors, earn an average of 3200 miles per month and extra passenger conductors earn an average of 5500 miles per month, provided the return of such men to the road conductor extra list would not reduce the average earnings of the list below 2600 miles per month where the list is other than an extra passenger conductor list and below 4500 miles per month where the list is an extra passenger conductor list. On seniority districts where an agreement such as is provided for in Rule 2-C-1 (b) is in effect, and some of the road conductors who previously had been reduced under the circumstances set forth above elect to remain in a position of brakeman, baggageman, or assistant conductor or ticket collector, a number of junior road conductors working as brakemen, baggagemen, or assistant conductors or ticket collectors in the seniority district equal to the number of road conductors so electing shall not be permitted to work as brakemen, baggagemen, or assistant conductors or ticket collectors.

(c) Management shall keep a record of the earning of extra road conductors on extra road conductor

lists and a copy of such statement of earnings shall be furnished interested local chairmen of the Organization signatory hereto."

"5-N-6. (a) When a conductor vacancy occurs at a time when regular or extra conductors are not available, the manner of calling qualified conductors who are working as brakemen, baggagemen, or assistant conductors or ticket collectors for use as conductors shall be as agreed to, in writing, between the Superintendent and the interested Local Committee or Committees of the Organization signatory hereto.

(b) The agreement referred to in paragraph (a) of this rule (5-N-6) shall clearly set forth the manner in which qualified conductors working as brakemen, baggagemen, or assistant conductors or ticket collectors shall be called to perform work as conductors." (pp. 106 and 107 of Exhibit "D".)

are void and in violation of the Railway Labor Act, particularly Section 2, First, Second, Third, Fourth, Seventh, and Ninth thereof, to the extent that said provisions seek or purport to provide under what conditions and under what circumstances a road brakeman, baggageman, or alleged assistant conductor or ticket collector, working as such, will enter the ranks of the class and craft of a road conductor and engage in the work of a road conductor, and to said extent said provisions constitute an unlawful and illegal infringement upon the exclusive right of the ORC, and its representatives, as the duly accredited representative and bargaining agent of the class and craft of road conductors, to represent in collective bargaining the class and craft of road conductors.

18. That at the time of the signing and making of said agreement, Exhibit "D", and ever since said time, and at the present time, the schedule and agreement hereinbefore referred to and identified as Exhibit "A",

insofar as the Penn RR and the class and craft of conductors were concerned, was and still is in full force and effect, and that under Regulation 5-F-1 thereof, reading as follows:

"5-F-1. When there is sufficient extra road service to justify the establishment of a regular extra conductors' list, such list may be established, if mutually agreeable to the division officers and the local committees."

and control of "such list", known as the Conductors' Extra Board, was recognized not only by the Penn RR, but by the General Chairman of the BRT and the Local Chairmen of the BRT, as being controlled and governed by the ORC, by and through its General Chairmen and its Local Chairmen of the Local Committees of Adjustment located, as hereinbefore alleged, along the lines of the Penn RR at division points.

19. That said Penn RR, since August 14, 1942, has failed and refused, and continues to refuse, to negotiate or bargain with the ORC, and its representatives, as the duly accredited representative under the provisions of the Railway Labor Act for the class and craft of road conductors, with regard to the performance of conductors' work on the heavy passenger trains and the Conductors' Extra Board, and has asserted and still asserts that said matters are concluded by reason of the agreement negotiated with the said BRT; that Penn RR is, by reason thereof, violating the provisions of the Railway Labor Act, and is denying to the plaintiffs the rights and privileges conferred upon them by the provisions of the Railway Labor Act to bargain collectively for the class and craft of road conductors; that plaintiffs have no plain, speedy, and adequate remedy at law, and unless said provisions of said agreement, Exhibit "D", and the oral agreement hereinbefore referred to,

constituting an unlawful and illegal infringement upon the right of the plaintiffs to represent the class and craft, are declared void, and unless a permanent injunction issue enjoining the defendant from continuing in effect said illegal and unlawful agreements, and said Penn RR is ordered and directed to negotiate solely and alone with the accredited representative of the class and craft of road conductors, plaintiffs, and the class and craft of road conductors which said ORC represents, will suffer irreparable injury and damage, for which they will have no redress.

COUNT II

For a second claim, plaintiffs respectfully show to this Court and allege:

20. That plaintiffs repeat and re-allege each and every allegation mentioned and contained in paragraphs numbered 1 to, 19, both inclusive, of this complaint.

21. That following the temporary suspension of the joint negotiations for the revision of certain rules and working conditions in May, 1941, and the resumption of said negotiations on or about December 5, 1941, by reason of the then-existing emergency there was a further increase in railroad traffic on the Penn RR, which was given further impetus and increase by the entry of the United States of America into the war on December 7, 1941.

22. That the order of promotion on the Penn RR is from road brakeman to road conductor; and that, as a result of said emergency and the great increase in railroad traffic, a large and substantial number of men who had prior to said emergency, and in normal times, been working as road brakemen entered into and upon active service as road conductors.

23. That the General Chairmen of the ORC and the General Chairmen of the BRT engaged in conferences

between themselves during the course of the negotiations with the Penn RR, and the representatives of the BRT in said conferences assured and represented to the ORC that there was no desire upon their part to infringe upon the jurisdictional right of the ORC to negotiate for the class and craft of road conductors; that, acting on such assurances, said General Chairmen for the ORC joined with the General Chairmen of the BRT in preparing proposals concerning working conditions for counter-submission to said Penn RR, which rules were submitted to the Penn RR on or about April 9, 1942.

24. That during July, 1942, the BRT filed before the First Division of the National Railway Adjustment Board certain time claims in large and substantial amounts, asserting that certain road brakemen who had assisted road conductors in the taking of tickets from passengers were entitled to be compensated at the rate of pay of "assistant conductors or ticket collectors", rather than the rate of pay as road brakemen, which claims were resisted and denied by the Penn RR until the consummation of the unlawful plan hereinafter described.

25. That said Penn RR and BRT conspired and confederated in an unlawful plan of action or program designed to embarrass, discredit, and weaken the ORC and to assist and strengthen the BRT and thereby to influence, coerce, and interfere with the class and craft of road conductors in their choice of a collective bargaining representative.

26. That said Penn RR, in pursuance of said unlawful plan, while purporting to conduct joint negotiations, made a private and secret agreement with the BRT to carve out of the road conductors' work a purported new class or craft of "assistant conductors"; that, by private and secret agreement, the Penn RR also negotiated with the BRT with regard to the manning, creation,

and control of a conductors' extra board; and that such action was a clear invasion of the jurisdictional province and representative rights of the ORC as the lawful bargaining agent of the class and craft of conductors, and was done for the purpose of strengthening the BRT and weakening and embarrassing the ORC in their respective standings with the class and craft of conductors.

27. That the said unlawful agreements with respect to the creation of the class and craft of so-called assistant conductors and the establishment and control of a conductors' extra board were incorporated in the BRT schedule (see Exhibit "D", pars. P-A-1 and 5-N-5 and 5-N-6 at pp. 106-107), and the Penn RR caused such schedule to be rushed to publication and circulation among the class and craft of road conductors.

28. That the Penn RR, in an effort to promote good will toward the BRT and weaken and discredit the ORC, sought to bring about a settlement of all claims filed by the BRT before the First Division of the National Railway Adjustment Board, and published and gave wide circulation, along with the BRT, of its proposed settlement, a true and correct copy of same being attached hereto, made a part hereof, and marked Exhibit "F".

29. That said Penn RR has engaged in dilatory tactics, has failed and refused to bargain and negotiate in good faith with the ORC; that no conferences were held with plaintiffs from and after July 24, 1942, (other than to deliver instruments marked Exhibits "B" and "C"), until August 27, 1942; that the Penn RR is intentionally delaying negotiations with the ORC to grant the BRT an opportunity to invoke the services of the Board under the provisions of the Railway Labor Act for a certification to represent the class or craft of road conductors and to obtain an election in such class or craft at a time when the working conditions of the

conductors are in a state of uncertainty; and that the unlawful failure and refusal of the Penn RR to bargain and negotiate is embarrassing the ORC with its members.

30. That said Penn RR in conferences commencing August 27, 1942, and particularly on September 4, 1942, sought to coerce plaintiffs into the acceptance of rules and working conditions not satisfactory to it by directing attention to the failure of the ORC and the management to conclude an agreement between themselves, by referring to the proposed settlement of claims filed by the BRT before the National Railway Adjustment Board, by threats that the BRT was going to secure the right of representation of road conductors through the invocation of mediation, by stating that the management would not change its position irrespective of further negotiation or mediation with respect to said rules P-A-1 and 5-N-5 and 5-N-6 of the BRT schedule, and by expressing the management's dissatisfaction and disapproval with the participation in said negotiations of one B. C. Johnson, a vice-president of ORC and one of the plaintiffs in this case, because he was not an employee of the said Penn RR.

31. That said BRT, while representing to the ORC that it had no intention or desire to invade the jurisdiction of said ORC, was secretly soliciting authorization cards to represent the class or craft of conductors and that it has conspired and confederated with the Penn RR in all the acts aforesaid.

32. That said BRT has caused to be circulated among the class and craft of road conductors a statement that said Penn RR will not conclude any negotiations with the ORC or revise rules and working conditions pursuant to its demand and request therefor, on April 18, 1941.

33. That the Penn RR agreed to the said unlawful plan of action or program to obtain a substantial finan-

cial advantage through the use of so-called "assistant conductors" to do conductors' work at less than conductors' pay, and to secure a commitment from the BRT to adjust time claims of road brakemen, pending before the First Division of the National Railway Adjustment Board, at greatly reduced amounts.

34. That on or about September 23, 1942, the said BRT did file, as plaintiffs are informed and believe, with the Board, an invocation to be certified as the duly accredited representative of the class and craft of road conductors, and to displace and oust the ORC as such representative, and that said National Mediation Board has accepted jurisdiction of said request for its services.

COUNT III

For a third claim, plaintiffs next show to this Court and allege:

35. That plaintiffs repeat and re-allege each and every allegation mentioned and contained in paragraphs numbered 1 to 34, both inclusive, of this complaint.

36. That plaintiffs, on or about October 28, 1942, filed with the Board a protest against the holding of an election "at this time" among the craft or class of road conductors of the Penn RR, a true and correct copy of which is attached hereto, made a part hereof, and marked Exhibit "G".

37. That the said protest of the plaintiffs charged that the Penn RR was interfering with, influencing and coercing the said conductors in their choice of a bargaining representative by unlawfully bargaining with the BRT with respect to working conditions of the craft or class of road conductors, by infringing upon the jurisdiction of the ORC, by breaching an existing contract between the Penn RR and ORC, by delaying and refusing to bargain with the ORC as the bona fide representative of the craft or class of road conductors,

by publicizing its displeasure with the ORC organization and its firm intention to deprive the ORC of its jurisdiction as the lawful bargaining representative of the craft or class of road conductors, and by aiding the BRT in publishing all such information amongst the craft or class of road conductors.

38. That said protest of the plaintiffs also requested that the Board grant the ORC an opportunity to be heard on such charges; and that such request for a hearing was again urged orally by representatives of the ORC at a conference with Mr. David J. Lewis, member of the National Mediation Board, and Mr. Robert F. Cole, Secretary of the National Mediation Board, on or about November 12, 1942.

39. That, notwithstanding the said charges of carrier interference, plaintiffs' request to be heard and to present evidence in connection therewith was denied by the Board in a letter dated November 9, 1942, a true and correct copy of which is attached hereto, made a part hereof, and marked Exhibit "H".

40. That the Board ruled that it had "no jurisdiction" or "power" to consider the charges of the ORC under authority granted it by the Railway Labor Act; that the provisions of Section 2, Ninth, which require the Board "to insure the choice of representatives by the employees without interference, influence, and coercion by the carrier," limited the power of the Board with respect to carrier interference to that occurring at the time of taking a secret ballot and in a prescribed geographical area; and that pursuing this unreasonable and illegal construction of Section 2, Ninth, of the Railway Labor Act, the Board held no hearing or investigation to determine whether the said charges of interference were true.

41. That the Board had jurisdiction and the duty and obligation under the Railway Labor Act to determine whether or not the unfair labor practices and vio-

lation of the Railway Labor Act charged against the Penn RR were true and would interfere with, influence or coerce the craft or class of road conductors in their choice of a bargaining representative; and that the Board had the further duty and obligation if it found that such unfair labor practices would interfere with; influence and coerce the said craft or class of road conductors in their choice of a bargaining representative to postpone the holding of an election until such time as the Board should determine that such unlawful interference, influence and coercion had ceased.

42. That the Board acted wrongfully and illegally in refusing to take jurisdiction and consider said charges and insure the choice of a bargaining representative for the craft or class of road conductors without interference, influence or coercion.

43. That on or about December 2, 1942, the Board purported to order an election on the Penn RR to determine the bargaining representative for the craft or class of road conductors thereon; that a count of the ballots by the representatives of the Board purports to show that the BRT received a majority of the votes cast at such election; that on December 27, 1942, the Board purported to issue, as a result of such election, a certification that the BRT was the designated and authorized representative of the craft or class of road conductors on the Penn RR.

44. That the said election and the said certification are illegal, invalid, and null and void for the reasons, amongst others, that the Board failed and refused to perform its duties and determine whether the unfair labor practices charged to the Penn RR would interfere with, influence or coerce the craft or class of road conductors in their choice of a bargaining representative at such election, and because the unfair labor practices complained of did constitute in fact an unlawful interference, influence and coercion by the Penn RR

with the choice of a bargaining representative by the craft or class of road conductors thereon at such election.

45. That plaintiffs have no adequate remedy at law, that, unless it be adjudged and decreed that said election and certification are of no force and effect and a nullity and such other relief granted as hereinafter prayed for, plaintiffs will suffer irreparable damage, loss, and injury.

WHEREFORE, plaintiffs demand judgment against the defendants:

(1) That said election held from December 5, to December 19, 1942, and the said certification issued December 27, 1942, by the National Mediation Board, certifying "that the Brotherhood of Railroad Trainmen has been duly designated and authorized to represent the craft or class of road conductors, employed by the Pennsylvania Railroad Company, for the purposes of the Railway Labor Act" be annulled, vacated and set aside.

(2) (a) That the National Mediation Board, George A. Cook, and David J. Lewis and each of them and their agents, officers and employees be restrained and enjoined from holding an election or utilizing any other method of ascertaining the bargaining representative for the craft or class of road conductors on the Penn RR until it has considered the unfair labor practices complained of and until it finds and determines after investigation and hearing, that they do not constitute an interference, influence or coercion by the Penn RR of the craft or class of road conductors in their choice of a bargaining representative:

(b) That in the alternative the Court declare that the practices complained of against the Penn RR constitute unlawful interference, influence or coercion by the Penn RR of the craft or class of road conductors in their choice of a bargaining representative; and restrain and enjoin the National Mediation Board, George

A. Cook, and David J. Lewis and each of them and their agents, officers, and employees from holding an election or utilizing any other method of ascertaining the bargaining representative of the craft or class of road conductors on the Penn RR until said Board finds and determines after investigation and hearing that such interference, influence or coercion has ceased.

(3) That it be declared and adjudged that paragraph P-A-1 of said schedule, Exhibit "D" and the oral agreement between defendants made in connection therewith, are void and of no force and effect, and in violation of the Railway Labor Act, Section 2, First, Second, Third, Fourth, Seventh, and Ninth thereto, to the extent that the same purports and attempts to provide, by a collective bargaining contract made between defendants, for the performance of work of the class and craft of road conductors, as being an alleged and purported agreement for the class and craft of road conductors not negotiated with the duly accredited representative of the class and craft of road conductors, and to which the ORC, the duly accredited representative of the class and craft, was not a party.

(4) That paragraphs 5-N-5 and 5-N-6 of said schedule, Exhibit "D", be declared and adjudged void and in violation of the Railway Labor Act, particularly Section 2, First, Second, Third, Fourth, Seventh, and Ninth thereof, to the extent that said provisions seek or purport to provide under what conditions and under what circumstances a road brakeman, baggageman, or alleged assistant conductor or ticket collector, working as such, will enter the ranks and class and craft of road conductors, and engage in and perform the work of road conductors, and that said provisions to said extent constitute an unlawful and illegal infringement upon the exclusive right of the plaintiffs, and the ORC as the accredited bargaining agent of the class and craft of

road conductors, to represent said class and craft in collective bargaining.

(5) That it be declared and adjudged that the ORC, as the accredited representative of the class and craft of road conductors, has the exclusive right to negotiate in collective bargaining with respect to all working conditions for said class and craft of employees on said railroad companies.

(6) That said Penn RR and said B&E RR be permanently enjoined from negotiating, bargaining with, and making or maintaining agreements with the said BRT, or any union other than the ORC, with regard to the class and craft of road conductors or the work of such class or craft, so long as said ORC is the accredited representative of the class and craft of road conductors.

(7) That the defendants Penn RR and B&E RR be ordered and directed to negotiate and bargain with the ORC in accordance with the Railway Labor Act as to all working conditions of the class and craft of road conductors so long as the ORC is the accredited representative of such class and craft.

(8) That the defendants Penn RR and B&E RR be permanently enjoined from directly or indirectly coercing, influencing, or interfering with the class and craft of road conductors in their choice of a representative under the provisions of the Railway Labor Act.

(9) That the plaintiffs have such other and further relief as may to the Court be deemed just and equitable in the premises.

(Signed) RUFUS G. POOLE,

Rufus G. Poole,
815 Fifteenth Street, Northwest,
Washington, D. C.

(Signed) V. C. SHUTTLEWORTH,

V. C. Shuttleworth,
1143 Merchants Bank Building,
Cedar Rapids, Iowa

Attorneys for Plaintiff.

EXHIBIT "G"

ORDER OF RAILWAY CONDUCTORS
OF AMERICA

C O P Y

Cedar Rapids, Iowa
Oct. 28, 1942

Mr. Robert F. Cole, Secretary
National Mediation Board,
Washington, D. C.

Dear Mr. Cole:

Reference is made to your file Case R-972.

In our letter to you September 28, 1942, we advised you of our desire to file a resistance to the invocation of your Board's services by the Brotherhood of Railroad Trainmen, under Section 2, Ninth, of the Railway Labor Act, involving representation of road train conductors, employees of the Pennsylvania Railroad System. You acknowledged our letter on October 3, and I am now in receipt of yours of October 23, in which you advise that this Case will soon be reached on your docket for handling and you therefore suggest that any statement which we may care to make in connection therewith, be submitted to your Board promptly.

On April 18, 1941, the management of the Pennsylvania Railroad served notice on the General Chairman, Order of Railway Conductors and Brotherhood of Railroad Trainmen, of their desire to revise the working agreements. This notice was served in advance of the notice of the five Transportation Organizations for wage increases and also in advance of the Carriers' notices for revisions of the schedule rules in the Eastern, Southeastern and Western Regions, later considered on a national basis and covered by settlement of December 5, 1941.

At the time the Pennsylvania Railroad Management's notice was served upon the General Chairmen, O. R. C. and B. R. T., April 18, 1941, and for many years prior thereto, the working agreements for conductors, trainmen and yardmen, were jointly negotiated and all rules for these three crafts were printed in a single book or working agreement.

While original conferences between management's representatives and the General Committees, O. R. C. and B. R. T., were held early in 1941, in connection with the proposed revision of schedule rules, negotiations were suspended during the national wage movement and resumed a short time after the settlement of the national wages and rules issues, December 5, 1941.

Negotiations on behalf of the Order of Railway Conductors have continued and are still in progress. Negotiations between the representatives of management and the Brotherhood of Railroad Trainmen were concluded in August and the signed agreement printed and distributed to become effective September 16, 1942. The origin and conclusion of separate negotiations between representatives of the Pennsylvania Railroad management and the General Committees of the Brotherhood of Railroad Trainmen, are attributable to the following circumstances:

1. At conference on or about July 24, 1942, a point of disagreement developed over the insistence of the Brotherhood of Railroad Trainmen that the Conductors' Extra Board should be maintained and operated under the joint jurisdiction of the O. R. C. and B. R. T. Committees.

2. A second point of difference developed between the O. R. C. and B. R. T. Committees in connection with the assignment of additional conductors as helpers, i.e., a sufficient number of conductors to handle the conductor's work of collecting transportation, etc., within the tour of duty on certain heavy

passenger trains. From January 1942 until July 1942, a number of additional conductors, compensated at the conductors' rate, had been assigned by agreement to certain heavy passenger runs. It is significant that with the commencement of the joint conference early in July 1942, and without notice to hold conference with the O. R. C. Committees, the assignment of additional conductors was abolished by management. In the joint conferences the B. R. T. claimed the exclusive right to represent and negotiate with management on conductor helpers and with this position management agreed. It seems to be a justifiable inference, in view of all of the circumstances, that some prior understanding had been reached between management and the B. R. T. with reference to this question.

3. As a result of these differences, the O. R. C. Committee representing the Conductors, served formal notice upon the railroad management and upon the Brotherhood of Railroad Trainmen on August 3, 1942, of the decision of the O. R. C. Committee to discontinue the joint relationship with the Brotherhood of Railroad Trainmen in the negotiation of a working agreement for conductors.

4. Thereafter the negotiations proceeded (separately) until on or about August 14, 1942, when an agreement between the management and B. R. T. Committee was signed.

5. When representatives of the Order of Railway Conductors arrived at the conference with officers of the Pennsylvania Railroad on August 27, 1942, to continue negotiations for the Conductors, they were presented with a copy of the agreement which management had signed with the Brotherhood of Railroad Trainmen. This agreement contained rules regulating the number of miles minimum and maximum, which would determine the number of conductors on the Conductors' Extra Board, stipulating the mileage levels (average) for extra conductors upon which increases or decreases in the

number of extra conductors assigned to the Board, would be determined.

6. The agreement with the B. R. T. also contained rules purporting to create a class of Assistant Conductors or Ticket Collectors, with a specified rate of pay, seniority, etc. After the distribution of the printed B. R. T. schedule the management posted notices that said purported craft or class was to be established by certain qualifying requirements, such as an examination, instruction on the handling of transportation, etc., after which said purported class or craft of Assistant Conductors or Ticket Collectors, would be supplied with all of the equipment, reports, ticket punch, tariffs, etc., theretofore issued only to qualified road passenger train conductors, i.e., men who had passed the required examination for promotion from trainman to conductor, whose names appeared on the Conductors' roster, and who had qualified for passenger service. The Pennsylvania Railroad has had no craft or class of Assistant Conductors or Ticket Collectors and have not in the years gone by, reported such a craft or class to be incorporated in the report M-300 I. C. C. Wage Statistics, Reporting Division No. 112. If one conductor could not perform the conductor's work, an additional conductor at conductor's pay had been assigned as a result of negotiations between the O. R. C. and the management until management's termination of this practice without notice, and the almost simultaneous agreement of management with the B. R. T.'s position that it had the right to negotiate for conductor helpers. The negotiation of a rule with the Brotherhood of Railroad Trainmen was therefore, an attempt to carve out and take away a portion of the conductors' work and assign it to an alleged new craft or class and place such purported craft or class under the jurisdiction of the B. R. T. The rate of pay established for such purported craft or class and printed in the agreement is \$1.29 per day below

the conductors' rate of pay, now in effect, and paid to conductors on helper assignments January to July 1942, hereinbefore mentioned.

7. Under present O. R. C. Rules governing the filling of conductors' vacancies when no Conductors' Extra Board is maintained or where Conductors' Extra Board is exhausted, the senior promoted emergency conductor is called for the vacancy. Management and the Committee of the Brotherhood of Railroad Trainmen devised a rule applicable to conductors, which they then incorporated in the agreement with the B. R. T. which purportedly became effective September 16, 1942, providing that the representatives of the management and of the B. R. T. would determine (notwithstanding the seniority of the men who might be in the terminal at the time) who would be called to perform work as a conductor.

8. Rules have been in effect on the Pennsylvania Railroad for many, many years zoning extensive seniority districts so as to enable men to remain in the service either as conductor or trainman in their home zones rather than being forced to accept employment in other zones distant from their home locations. Management and the B. R. T. Committee have continued this arrangement in the rules which have been written into the B. R. T. agreement, effective September 16, 1942, but management has demanded of the Conductors' Committee the surrender of the zoning rules so far as they are applicable to conductors, as a condition precedent to any negotiations recognizing the conductors' jurisdiction over Conductors' Extra Boards.

9. Under date of September 4, 1942, we received a report from our representatives that on that date (about 8:45 A. M.) management of the Pennsylvania Railroad called General Chairman J. E. Magill, Pennsylvania Lines East, requesting that he and C. E. Kalkman, General Chairman, Pennsylvania Lines West, meet Mr. C. E. Musser, Super-

intendent Labor and Wage, Eastern Region, in his office at 11:00 A. M. that date. The General Chairmen met him as requested and the following statements were made to the General Chairmen by Mr. Musser:

"(a) If you think you are going to secure any new or different Rules than we have given the Trainmen, you are mistaken.

(b) The Pennsylvania Management is paying approximately 75% of all pending B. of R. T. Claims docketed with the National Railroad Adjustment Board including claims that have been properly presented to the Management and not yet progressed to the Board, all of which will be paid on the basis of the B. of R. T. Agreement, effective September 16, 1942.

(c) The O. R. C. Committee will be in an embarrassing position if they do not have a new Agreement in effect at the same time that the B. of R. T. Agreement goes in effect, also the O. R. C. Committee will be in a hot spot when the B. of R. T. claims are paid based on the new Agreement.

(d) If you invoke Mediation we will not change our position with respect to Rules governing Conductors returning to Brakemen's ranks, and in event Mediation is invoked the B. of R. T. will be a party to such Mediation proceedings.

(e) We want it thoroughly understood that regardless of the outcome of this controversy that I (Mr. Musser) will still have a job with the Pennsylvania Railroad because I am too deeply entrenched, and while it is true we are looking for an understudy for my position, we have not as yet found one.

(f) There is no question but that the B. of R. T. is going to take a vote on the Pennsylvania in an attempt to secure the representation of the Road Conductors.

(g) This is the first time the General Chairmen on the Pennsylvania Railroad have ever called in a Vice-President to assist in Negotiating Rules and Working Conditions. They have always prided themselves with the fact that they have done the job without assistance."

In connection with paragraph (b) of the foregoing quotation, we attach hereto, a letter bearing date of August 17, addressed to the General Chairmen, B. of R. T. Committees, Pennsylvania Lines East and West, by the four General Managers, outlining the formula to be followed in the adjustment of pending claims as agreed upon in conference August 14 and August 17, 1942. The implication is that in reciprocation for the rules incorporated in the B. R. T. Agreement the General Chairmen B. R. T. agreed to the adjustment of their pending claims on a basis somewhat below (from a compensation standpoint) the amount of money involved in the claims as originally submitted.

The immediate printing and distribution of the Agreement which at the time its contents were made known to the O. R. C. Committee on or about August 27, 1942, and which did not become effective until September 16, 1942, considered in the light of Mr. Musser's statements in paragraphs (c) and (f) in the above quotation from conference record of September 4, 1942, constitute far reaching implications as to the programs apparently agreed upon between the Management and the General Committee, Brotherhood of Railroad Trainmen, culminating in the latter's invocation of your Board's services on or about September 23, 1942, official notice of which was conveyed to us in your letter of that date.

Negotiations between the Order of Railway Conductors and the management of the Pennsylvania Railroad are still under way and unless a satisfactory settlement

is reached, it will be necessary for the Order of Railway Conductors, as its next lawful step under the provisions of the Railway Labor Act, to invoke the services of your Board in its effort to complete the negotiations of schedule rules governing Conductors. In the meantime, the schedule rules governing Conductors as originally contained in the Agreement in effect April 18, 1941, at the time the Carrier served its notice of desire to revise said Agreement, are still in effect. The rules in the Agreement will continue in effect until revised, amended or abrogated in present negotiations. In the meantime, there are other rules in the Agreement between the Management and the Brotherhood of Railroad Trainmen, which allegedly became effective September 16, 1942, which contain provisions contrary to those rules governing Conductors' employment upon which Agreement has not yet been reached between Management and the O. R. C. Committee in present negotiations.

It will be readily clear to your Board that the status of the schedule negotiations between the O. R. C. Committee and the Railroad Management is the direct product of Management's incorporation of certain conductors' rules in the B. R. T. Agreement without conference with or concurrence of the Conductors' Committee. This action, coupled with the release of the printed Agreements, is highly prejudicial to the Conductors' position and has been used as the basis for invoking your Board's services on a question of representation. The position of the Conductors' Committee, Order of Railway Conductors, has been further prejudiced by the spreading of various detrimental rumors over the property and by the distribution of circular letters by representatives of the Brotherhood of Railroad Trainmen, which, coupled with the action of the Railroad Management, would prevent an election "without interference, influence, or coercion exercised by the Carrier."

Due to the war in Europe and the Lease Lend activi-

ties followed by our own entry into the war, there has been a very substantial, temporary increase in the number of conductors' positions on the Pennsylvania Railroad, as well as on other railroads as disclosed in the I. C. C. reports. The additional men now working as conductors came from the ranks of men, who before the emergency, were working in positions other than as conductors. It is a matter of common knowledge that the increased railroad business is but a temporary condition due to the war emergency and to hold an election under these temporary war conditions would not bear any relation to the situation as it existed before the present emergency and as it will exist after the war.

In conclusion it is our position and contention that an election should not be held under the provisions of the Railway Labor Act at this time; that such an election would be contrary to the provisions of the Act and should and ought to be contrary to the policy of your Board under present war conditions in that—

1. Joint negotiations on revision of schedule rules having been commenced with all parties, i.e., management, B. R. T. and O. R. C., without any question raised as to the right of the O. R. C. to represent conductors by either management or the B. R. T., the B. R. T. should be barred and precluded from seeking an election, during the continued pendency of the O. R. C. negotiations with the management.

2. Under the circumstances hereinbefore set forth, it would be contrary to the express provisions and the spirit of the Act to hold an election at this time.

3. An election at this time could not be said to be one "without interference, influence and coercion exercised by the Carrier".

4. To hold an election among the men now working as conductors on the Pennsylvania Railroad in war time and the tremendously increased traffic

and employment resulting therefrom, would be unfair and contrary to the intent and spirit of the Act. This condition, which admittedly is a temporary one and certain to cease almost immediately upon the conclusion of the war, would make it possible for a large number of men to vote in the class or craft of conductors at this time when a large majority of such men who have only been working as promoted conductors since the commencement of the emergency will, immediately upon its termination, be actually working as brakemen, flagmen, and baggagemen. An election at this time would place the balance of power with men whose positions as conductors will terminate at the end of the war.

5. The acceptance by this Board of the invocation and the conduct of an investigation and election during the pendency of negotiations commenced at a time when not only management but the B. R. T. as well, recognized the right of the O. R. C. to represent the craft of conductors, will prevent any further attempt by the management to reach an Agreement with the O. R. C. Committee on the revision of the schedule. The record discloses that as long ago as September 4, 1942, the Carrier was seeking to coerce the O. R. C. Committee by the threat that the B. R. T. were going to attempt to secure the Conductors' representation. Management has, by the wide spread of dates between conferences with the O. R. C. Committee, delayed negotiations apparently having been advised in advance of the representation issues to be raised. Management has been and is now attempting to coerce the O. R. C. Committee into an acceptance of rules and working conditions contrary to long established practice by both directly and indirectly implying that the O. R. C. had better agree upon a schedule agreement before invocation was requested by the B. of R. T. or before an election is held.

6. The record very briefly referred to herein clearly demonstrates some understanding, express or implied, as between the Carrier and the B. R. T. in an attempt to bring about the termination of the representation of the conductors by the O. R. C. upon the Pennsylvania Railroad. For your Board to grant an invocation and hold an election, under the circumstances, would be contrary to the intent and spirit of the Railway Labor Act; should and ought to be contrary to the policy of your Board under present war conditions, and would be at variance with the principles of union security recognized by the War Labor Board.

We therefore wish to go on record as opposing the granting of invocation and the holding of an election on the Pennsylvania Railroad for the reasons outlined above. We shall be pleased to present further evidence in support of what we have here stated and request that we be afforded an opportunity to be heard.

Yours very truly,

(Signed) H. W. Fraser

BG.

President, O. R. C.

EXHIBIT "H"

R-972

November 9, 1942

Mr. H. W. Fraser, President
Order of Railway Conductors
Cedar Rapids, Iowa

Dear Mr. Fraser:

This will acknowledge your letter of October 28, 1942, by which you protest the Board's acceptance of the application of the Brotherhood of Railway Trainmen and the holding of a representation election under the Railway Labor Act among road conductors of the Penn-

sylvan Railroad, case our file R-972. In addition you request an opportunity to be heard and present further evidence in support of your contentions.

In your letter the position of the Order of Railway Conductors is set forth under six separate counts, which for clarity we have further divided and summarized as follows:

1. Joint negotiations on revision of schedule rules having been commenced with all parties, i.e., management, B. R. T. and O. R. C., without any question raised as to the right of the O. R. C. to represent conductors by either management or the B. R. T., the B. R. T. should be barred and precluded from seeking an election, during the continued pendency of the O. R. C. negotiations with the management.

2. Under the circumstances hereinbefore set forth it would be contrary to the express provisions and the spirit of the Act to hold an election at this time.

3. An election at this time could not be said to be one "without interference, influence or coercion exercised by the carrier."

4. To hold an election among conductors on the Pennsylvania Railroad in war time and under temporary increased traffic resulting therefrom would be unfair and contrary to the intent and spirit of the Railway Labor Act.

5. (a) Acceptance by the Mediation Board of the invocation and the conduct of an investigation and election during the pendency of negotiations between the Order of Railway Conductors and the management will impair any further disposition of management to reach an agreement with the Order of Railway Conductors.

- (b) The management has been and is now attempting to coerce the Order of Railway Conductors committee into an acceptance of rules and

working conditions contrary to long-established practice by directly and indirectly implying that the Order of Railway Conductors should agree upon a revised schedule before an election is held.

6. (a) The record clearly demonstrates some understanding, express or implied, between the carrier and the Brotherhood of Railroad Trainmen in an attempt to terminate representation of conductors by the Order of Railway Conductors on the Pennsylvania Railroad.

(b) For the Mediation Board to grant invocation and hold an election under the circumstances would be contrary to the intent and spirit of the Railway Labor Act, should be contrary to the policy of the Board under present war conditions, and it would be at variance with the principles of union security recognized by the War Labor Board.

The above points are susceptible, we believe, to appropriate groupings for the purpose of consideration and discussion, and they are therefore being referred to under the three following general headings:

Nos. 2, 4 and 6 (b).—These items deal with Section 2, Ninth, of the Railway Labor Act and the duty of the Mediation Board thereunder. For ready reference we quote the pertinent provision of this Section as follows:

“If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations involved in the dispute, and certify the same to the carrier.”

While the Board has considered the circumstances and contentions in your letter, it has also considered its duty under the provisions of the Railway Labor Act. When an application for investigation of a representation dispute is received and it is found to be properly supported by employee authorizations, the Board has no alternative but to investigate it under the statute. The Board is charged with the responsibility of determining the names of the individuals or organizations designated and authorized to represent the employees, and certify the same to the carrier. Discharge of these functions is without qualification as to the circumstances out of which the representation dispute arose. Failure to proceed with an investigation when its services have been properly invoked would ultimately subject the Board to mandamus action as a means of forcing it to execute its administrative functions under the law.

It has been observed by the Board that an organization seeking representation of a craft or class of employees will request an election at its most opportune time, whether it be a temporary increase in the business of the carrier, as in this case, or an intra-union quarrel which arouses resentment of the employees, as in other cases. Whatever the pretext for seizing such advantages, it follows that the selection of representatives under such circumstances is generally lacking in stability which in itself creates demand for "repeat" elections from which the Board has no escape. Nevertheless the Board may not consider withholding the conduct of an election because temporary conditions appear to favor one of the contesting organizations.

It is noted you contend that for the Board to accept the Brotherhood's invocation and conduct an election under present war conditions would be contrary to the intent and spirit of the Railway Labor Act and should be contrary to the policy of the Board. You are familiar, of course, with the consideration which the Board fre-

quently in the past has given to the proposition that the standard railway labor unions find ways and means to settle their representation questions among themselves. Such efforts of the Board require no elaboration in this discussion. Suffice it to reiterate that such disputes seriously handicap the Board in its efforts to give prompt and efficient attention to mediation, its most important service and duty under the Railway Labor Act. If a railway labor union wishes to precipitate an inter-union representation dispute during the national emergency it must assume the responsibility for such a determination; but the statute leaves no discretion to the Board respecting its duties to resolve such disputes.

The principles of union security as developed by the War Labor Board, referred to by you, pertain to the protection of union membership and not to the avoidance of representation elections, as we understand it. Moreover, it is a framework the development and application of which, in the railway industry, addressed itself in the first instance directly to the carrier and its employees and may involve a legal interpretation of the Railway Labor Act which this Board is not empowered to make. Obviously, it raises no barrier to procedure in the instant case.

Nos. 1 and 5 (a)—These items deal with the effect which the investigation of a representation dispute has on pending negotiations on schedule changes for the same craft or class of employees.

Frequently it has been shown in the Board's experience that when a dispute is pending concerning the representation of a craft or class of employees, there can be no real progress toward the settlement of disputes concerning changes in rates of pay, rules and working conditions even though the representation with which the management is dealing is of long standing. Under such circumstances the Board has consistently followed the practice of taking action under Section 2,

Ninth, to resolve the representation dispute and thus eliminate this obstacle to settlement of the dispute through mediation.

Although mediation is not involved in your negotiations with the carrier, the problem presented is essentially the same. Your statement to the effect that the management is now using the representation issue as a means of coercing the Order of Railway Conductors' committee into acceptance of rules contrary to the long-established practice of your organization, evidences proof of our observation that where the question of representation is raised it is extremely difficult to negotiate rules until the representation issue is settled.

The Brotherhood's application is properly executed and adequately supported by employee authorizations, and the Board cannot find that the interference with your negotiations, as outlined by you, forms any legal basis for its rejection by the Board or for our delaying the investigation which the law compels.

Nos. 3, 5 (b) and 6 (a)—These items deal with alleged activity of the carrier designed to influence employees in their choice of representatives, which action is prohibited by Section 2, Third, of the Act. For convenience that part of the law here referred to is quoted as follows:

"Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence or coerce the other in its choice of representatives."

The contentions which you make regarding the carrier's influence arise out of circumstances ante-dating the Board's investigation of this case which was begun on November 2, 1942, circumstances in respect of which

the Mediation Board possesses no jurisdiction. Our power in such matters is to insure that during the time of taking a secret ballot or in exercising other methods of ascertaining the choice of representatives, the employees shall be free from interference, influence or coercion by the carrier. This, the Board can and will do within a prescribed area if, and when, an election is being held.

In this comment on carrier influence, it seems unnecessary to do more than point out to you that the Railway Labor Act prescribes an exclusive procedure for the protection of employees in the choice of representatives. The provisions of Section 3 as quoted above may be made effective through the application of Section 10 of the Act.

This leaves for final consideration your willingness to present further evidence in support of your statements and your request that you be afforded an opportunity to be heard. If you have in mind a formal hearing at which the interested parties would be present, we find nothing in the matters alleged in your protest which falls within the purview of a formal hearing customarily held in connection with representation disputes. As you know, hearing held by the Board under Section 2, Ninth, of the law has been for the purpose of determining who should participate in an election.

We shall be pleased, of course, to discuss orally with you or your representatives, if you wish, the basis upon which the Board has reached the conclusions stated herein, and we shall be glad to have you call at our office for this purpose any time you are in Washington.

In the above discussion we have dealt specifically with the issues raised by your protest as well as with your request for a hearing and we have pointed out the reasons why the Board is duty bound under the law to accept and act upon the Brotherhood's application. We have also shown why the Board cannot deal with the

other matters presented by you. We do not find in your submission reference to any provisions of the Railway Labor Act under which your protest may be legally granted, nor does the Board, itself, find any such provisions. Therefore, we conclude we have no alternative but to continue the investigation of this case which was commenced at Philadelphia, November 2, and the mediator in charge of the investigation has been advised accordingly.

By order of the NATIONAL MEDIATION BOARD.
Secretary.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

ORDER OF RAILWAY CONDUCTORS
OF AMERICA, et al., *Plaintiffs*,

vs.

NATIONAL MEDIATION BOARD,
PENNSYLVANIA RAILROAD COM-
PANY, BALTIMORE AND EASTERN
RAILROAD COMPANY, and BROTH-
ERHOOD OF RAILROAD TRAIN-
MEN, et al., *Defendants*.**Civil Action
No. 17,899****ANSWER BY DEFENDANT, BROTHERHOOD OF
RAILROAD TRAINMEN, TO AMENDED COM-
PLAINT FOR DECLARATORY AND INJUNC-
TIVE RELIEF****COUNT I**

Comes now the Defendant, Brotherhood of Railroad Trainmen, Answering the Amended complaint in the paragraph order alleged, states as follows:

1. Does not have sufficient knowledge or information to form a belief as to the truth of said allegations and therefore neither admits nor denies the same.

2. Does not have sufficient knowledge or information to form a belief as to the truth of said allegations and therefore neither admits nor denies the same.

3. Does not have sufficient knowledge or information to form a belief as to the truth of said allegations and therefore neither admits nor denies the same.

4. Admitted.

5. Does not have sufficient knowledge or information to form a belief as to the truth of said allegations and therefore neither admits nor denies the same.

6. Admitted.

7. Admitted.

8. Admitted.

9. Admitted.

10. The allegations of this paragraph containing conclusions of law are denied and the jurisdiction of this Court to grant injunctive relief is likewise denied.

11. Denies that at this time the ORC is a duly accredited representative and bargaining agent for the class and craft of road conductors on the Penn RR, but states that on December 27th, 1942, the National Mediation Board (Case No. R-972) certified "that the Brotherhood of Railroad Trainmen has been duly designated and authorized to represent the following craft or class of employees of the Pennsylvania Railroad for the purposes of the Railway Labor Act (road conductors)", said certification showing a vote of 1680 road conductors having voted for the BRT and 1122 as voting for the ORC, 8 road conductors having voted for other organizations, 81 ballots being void, 3283 road conductors being eligible to vote. Therefore the BRT received not only a majority of those voting, but a majority of those eligible to vote.

Admits the BRT is a duly accredited and recognized representative and bargaining agent for the class and craft of road brakemen on the Penn RR as well as for the class and craft of yard conductors, yard brakemen, baggagemen and switch tenders.

Admits that the BRT has jointly negotiated contracts or schedules with the railroad common carriers with regard to rates of pay, rules and working conditions of road conductors and road brakemen with the Penn RR.

Denies that such a schedule was negotiated to become effective April 1, 1927, but states that such an agreement has been in effect since August 1, 1921, which agreement was revised effective April 1, 1927, but admits that Plaintiffs' Exhibit "A" is a true copy.

Denies that said schedule is still in full force and effect and denies each and every other allegation of said paragraph, which is not herein expressly admitted.

12. Admits the allegations except that it denies that said conferences were held in abeyance by consent of all concerned until December 5, 1941, but states that continuous negotiations took place both by letters and conferences until August 3, 1942, when the Plaintiff, ORC, served notice of withdrawal from said conferences and joint negotiations.

13. Admits that there had developed a great increase in passenger traffic upon the Penn RR, but is unable to state whether said increase is due to the Lease-Lend Program and/or other causes, and admits that it became difficult for a single conductor to collect tickets and fares and perform his duties.

Denies that the ORC negotiated with the Penn RR for the placing of additional conductor or conductors on heavy passenger trains and denies each and every other material allegation of said paragraph.

This defendant states that long prior to the present emergency or Lease-Lend Program, passenger conductors for many years prior to the present emergency required and received assistance in the collection of tickets and fares from passenger brakemen represented by the BRT.

14. Admits that ORC withdrew from said joint negotiations but has no knowledge as to whether or not written notice of its withdrawal was served on the Penn RR on August 3, 1942, or whether Exhibit "B" is a true copy of said notice of withdrawal.

Has no knowledge as to whether or not Exhibit "C" is a true copy of letter of protest sent the Penn RR and therefore can neither admit or deny the same.

Denies each and every other material allegation of said paragraph.

15. Denies that the BRT and Penn RR signed and

executed any agreement at any time encroaching upon or invading the right of the representative of the class or craft of road conductors, but admits that on August 14, 1942, the BRT and the Penn RR entered into an agreement and the Plaintiff's Exhibit "D" is a correct copy of said agreement and that paragraph P-A-1 is correctly copied.

Denies each and every other material allegation of said paragraph 15.

16. Does not have sufficient knowledge or information to form a belief as to the truth of the alleged publication of certain rules and regulations on September 12, 1942, by the Penn RR and therefore neither admits nor denies the same.

Denies each and every other material allegation of said paragraph 16.

17. Admits that paragraph 5-N-5 and 5-N-6 of Exhibit "D" are correctly copied.

Denies each and every other material allegation of said paragraph.

18. Admits the allegations of this paragraph concluding with the quotation of paragraph 5-F-1.

Denies the balance of said paragraph.

19. Does not have sufficient knowledge or information to form a belief as to the truth of the allegation as to whether or not the Penn RR since August 14, 1942, has failed and refused, and continues to refuse, to negotiate or bargain with the ORC and therefore neither admits nor denies the same.

Denies each and every other material allegation of said paragraph.

COUNT II

20. Answering the second claim this defendant repeats each and every answer contained in paragraphs Nos. 1 to 19 both inclusive.

21. Admits there has been an increase in railroad traffic on the Penn RR since the entry of the United States in the World War, which was on December 8, 1941, and not on December 7, 1941, as alleged.

Denies each and every other material allegation of said paragraph.

22. Admits that the order of promotion on the Penn RR is from road brakeman to road conductor and that as a result of said emergency and the great increase in railroad traffic some men who had prior to said emergency and in normal times been working as road brakemen entered into and upon active service as road conductors.

In the absence of an allegation as to the specific number of such men, this defendant denies the number was "large and substantial".

23. Admits that General Chairman of the ORC and General Chairman of the BRT engaged in conferences between themselves.

Admits that the General Chairman of the ORC joined with the General Chairman of the BRT in preparing proposals concerning working conditions for counter-submission to the said Penn RR, which rules were submitted to the Penn RR on or about April 9, 1942.

Denies each and every other material allegation in said paragraph.

24. Denies that in July, 1942, the BRT filed before the first division of the National Railway Adjustment Board certain time claims asserting certain road brakemen had assisted road conductors in the taking of tickets from passengers and were entitled to be compensated as assistant conductors or ticket collectors or the rate of pay as road brakemen.

States that three such claims have been filed, one in January, 1938, one in December, 1939, and the last in March, 1940, it being a claim of the BRT that such men were entitled to extra compensation. It was not claimed

however that said men would be regarded as conductors thereby accepting the full responsibility for the operation of the train.

Denies each and every other material allegation in said paragraph.

25. Denied.

26. Admits the making of an agreement between the Penn RR and the BRT, which includes assistant conductors or ticket collectors.

Denies that said group was a new class or craft, but states that said group was placed in the agreement between the BRT and the Penn RR August 1, 1921.

Denies each and every other material allegation in said paragraph.

27. Admits that an agreement with respect to assistant conductors or ticket collectors was incorporated in the BRT schedule.

Does not have sufficient knowledge or information to form a belief as to the truth of the allegation as to whether or not the Penn RR caused said schedule to be rushed to publication and circulated among the class or craft of road conductors, and therefore neither admits nor denies the same.

Denies each and every other material allegation of said paragraph.

28. Admits Exhibit "F" is a true copy of letter addressed by certain General Managers of the Penn RR to the two General Chairmen of the BRT.

Denies each and every other material allegation of said paragraph.

29. Does not have sufficient knowledge or information to form a belief as to the truth of allegations to answer, and therefore neither admits nor denies the same.

30. Does not have sufficient knowledge or information to form a belief of the same, and therefore neither admits nor denies.

31. Denies each and every material allegation of said paragraph.

32. Denied.

33. Does not have sufficient knowledge or information to form a belief as to the truth of the allegations therein contained and therefore neither admits nor denies the same.

34. Admits that an invocation was filed with the Mediation Board to be certified as the duly accredited representative of the class and craft of road constructors, and that the said Mediation Board accepted jurisdiction and further says that on December 27, 1942, Case No. R-972, said Mediation Board so certified the BRT.

COUNT III

35. This defendant repeats each and every answer to the allegations contained in paragraph Nos. 1 to 34 inclusive.

36. Does not have sufficient knowledge or information to form a belief as to the truth of the same and therefore neither admits nor denies.

37. Does not have sufficient knowledge or information to form a belief as to the truth of the contents of the alleged protest and therefore neither admits nor denies the contents of said alleged protest.

38. Does not have sufficient knowledge or information to form a belief as to the truth of the same and therefore neither admits nor denies.

39. Does not have sufficient knowledge or information to form a belief as to the truth of said allegations or whether Exhibit "H" is a true copy of the ruling and therefore neither admits nor denies.

40. Does not have sufficient knowledge or information as to the ruling of the Board or whether Exhibit "H" is a true copy and therefore neither admits nor denies the same.

Denies the legal construction placed on Section 2, ninth, of the Railway Labor Act.

Denies each and every other material allegation of said paragraph.

41. Has no knowledge as to the violations of the Railway Labor Act charged against the Penn RR and therefore neither admits nor denies the portion of said paragraph relating to these charges.

Denies each and every other material allegation of said paragraph.

42. Denied.

43. Admits the Board ordered an election on the Penn RR to determine the bargaining representative for the craft or class of road conductors thereon and admits the BRT received the majority of the votes cast at said election and admits that on December 27, 1942, the Board issued a certification that the BRT was a duly designated and authorized representative of the craft or class of road conductors on the Penn RR.

States further that the BRT received 1680 votes; the ORC receiving 1122 votes; that 3283 employees were eligible to vote and therefore the BRT not only received a majority of the votes cast, but a majority of the number of employees eligible to vote.

44. Denied.

45. Denied.

WHEREFORE, Having fully Answered the Amended Complaint herein, this defendant prays that it be dismissed.

BERNARD M. SAVAGE

521 Title Building
Baltimore, Maryland

ALFRED L. BENNETT

Denrike Building
Washington, D. C.

Attorneys for Brotherhood of Railroad Trainmen.

Copy of Answer to Amended Complaint mailed to:

Robert L. Pierce, Esquire,
Room 3123 Department of Justice Building,
Washington, D. C.
*Attorney for Defendants,
National Mediation Board, George A.
Cook and David J. Lewis.*

R. A. Bogley, Esquire,
901 Hibbs Building,
Washington, D. C.
*Attorney for Pennsylvania Railroad
Company and Baltimore and Eastern
Railroad Company, Defendants.*

I HEREBY CERTIFY That copies of Answer were deposited by me in the United States Mail addressed to the above parties on the twenty-fifth day of January, 1943.

BERNARD M. SAVAGE

521 Title Building
Baltimore, Maryland.

Attorney for Brotherhood of Railroad Trainmen.

I HEREBY CERTIFY that a copy of the above Answer was served by me upon Rufus G. Poole, Esq., attorney for Plaintiffs, 815 15th Street, N. W., Washington, D. C., this 26th day of January, 1943.

ALFRED L. BENNETT

Attorney for Brotherhood of Railroad Trainmen.

IN THE
DISTRICT COURT OF THE UNITED STATES
 FOR THE DISTRICT OF COLUMBIA

ORDER OF RAILWAY CONDUCTORS OF AMERICA; H. W. FRASER as President of the Order of Railway Conductors of America, Room 312, 10 Independence Avenue, S. W., Washington, D. C.; B. C. JOHNSON as Vice President of the Order of Railway Conductors of America, Room 312, 10 Independence Avenue, S. W., Washington, D. C.; C. E. KALKMAN as General Chairman of the General Committee of Adjustment of the Order of Railway Conductors of America on The Pennsylvania Railroad for the Lines West, Room 312, 10 Independence Avenue, S. W., Washington, D. C.; and J. E. MAGILL as General Chairman of the General Committee of Adjustment of the Order of Railway Conductors of America on The Pennsylvania Railroad for the Lines East, Room 312, 10 Independence Avenue, S. W., Washington, D. C., *Plaintiffs*.

Civil Action
No. 17,899

NATIONAL MEDIATION BOARD, GEORGE A. COOKE and DAVID J. LEWIS individually and as members of the National Mediation Board, 18th and F Streets, N. W., Washington, D. C.; **THE PENNSYLVANIA RAILROAD COMPANY**, 626 14th Street, N. W., Washington, D. C.; **BALTIMORE AND EASTERN RAILROAD COMPANY**, 626 14th Street, N. W., Washington, D. C.; and **BROTHERHOOD OF RAILROAD TRAINMEN**, Room 400, 10 Independence Avenue, S. W., Washington, D. C., *Defendants*.

**SEPARATE ANSWER OF THE PENNSYLVANIA
RAILROAD COMPANY TO THE AMENDED
COMPLAINT FOR DECLARATORY AND IN-
JUNCTIVE RELIEF.**

FIRST DEFENSE

The complaint fails to state a claim against defendant, The Pennsylvania Railroad Company, upon which relief can be granted.

SECOND DEFENSE

The complaint fails to set forth a right of action over which this Court has jurisdiction.

THIRD DEFENSE

1, 2 and 3. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 1, 2 and 3 of the amended complaint.

4. This defendant admits the allegations of paragraph 4 of said amended complaint.

5. This defendant admits that the Baltimore and Eastern Railroad Company is a corporate common carrier within the provisions of the Railway Labor Act and is a corporation, incorporated under the laws of the State of Maryland, and denies all of the remaining allegations of paragraph 5 of said amended complaint.

6, 7, 8 and 9. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 6, 7, 8 and 9 of said amended complaint.

10. This defendant denies the allegations of paragraph 10 of said amended complaint.

11. This defendant denies that the ORC is the duly accredited and recognized representative and bargain-

ing agent for road conductors on The Pennsylvania Railroad and allèges that the National Mediation Board, in accordance with the powers conferred upon it by Section 2, Ninth, of the Railway Labor Act^o of 1934, (Act of May 20, 1926, C. 347, Sec. 2, 44 Stat. 577, as amended June 21, 1934; C. 691, Sec. 2, 48 Stat. 1186, 45 U.S.C.A. Sec. 102), has held an election among the employes of the class or craft of road conductors on The Pennsylvania Railroad and as a result thereof and in accordance with the powers conferred upon it by the Railway Labor Act has certified, under date of December 27, 1942, that:

"On the basis of the investigation and report of election, the National Mediation Board hereby certifies that the Brotherhood of Railroad Trainmen has been duly designated and authorized to represent the following craft or class of employes of the Pennsylvania Railroad, for the purposes of the Railway Labor Act:

Road Conductors."

(In the Matter of Representation of Employes of The Pennsylvania Railroad Road Conductors, Case No. R-972, National Mediation Board; this defendant admits that the BRT is the duly accredited and recognized representative and bargaining agent for the class and craft of road brakemen, yard conductors, ~~yard~~ brakemen, baggagemen and switch tenders on The Pennsylvania Railroad; this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations with respect to contracts negotiated jointly by the ORC and the BRT with other railroad common carriers; this defendant alleges that on August 1, 1921, it entered into an agreement with its road conductors, then represented by ORC, and its road and yard brakemen, baggagemen, assistant conductors or ticket collectors and switch tenders,

represented by BRT, covering the rates of pay, rules and working conditions of the said classes of employes and that said agreement was amended April 1, 1927; this defendant admits that Exhibit "A", attached to said amended complaint, is a true and correct copy of the said agreement, as amended April 1, 1927, and that said agreement, as amended April 1, 1927, is still in full force and effect between this defendant and its employes of the class or craft of road conductors; and this defendant denies all of the remaining allegations of paragraph 11 of said amended complaint.

12. This defendant admits that on or about April 18, 1941, it served a notice upon the ORC and BRT as the respective representatives at that time of road conductors and of yard conductors, road and yard brakemen, baggagemen, assistant conductors or ticket collectors and switch tenders, of the desire of the management to change certain provisions in said agreement, as amended April 1, 1927; this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations relating to meetings and agreements between representatives of the ORC and the BRT with reference to joint negotiations with this defendant; this defendant admits that joint conferences were held by its representatives with representatives of the ORC and BRT and that said conferences commenced on or about May, 1941; and this defendant denies all of the remaining allegations of paragraph 12 of said amended complaint.

13. This defendant admits that during the years 1941 and 1942 the volume of passenger traffic increased and that in a few instances, for a short period of time in the latter part of the year 1941, additional road conductors were placed upon a few of this defendant's trains; and this defendant denies all of the remaining allegations of paragraph 13 of said amended complaint.

14. This defendant admits that Exhibits "B" and "C", attached to said amended complaint, are true and

correct copies of letters received by this defendant, both dated August 3, 1942, and signed by J. E. Magill and C. E. Kalkman on behalf of the ORC; and this defendant denies all of the remaining allegations of paragraph 14 of said amended complaint.

15. This defendant admits that it entered into an agreement on August 14, 1942, with its employes in the craft or class of yard conductors, road and yard brakemen, baggagemen, assistant conductors or ticket collectors and switch tenders, through the duly accredited representative of said employes, the BRT; admits that Exhibit "D", attached to said amended complaint, is a true and correct copy of said agreement, and admits that the quotation set forth in paragraph 15, page 8, of said amended complaint, is a true and correct copy of Regulation P-A-1 of said agreement; and this defendant denies all of the remaining allegations of paragraph 15 of said amended complaint.

16. This defendant admits that Exhibit "E", attached to said amended complaint, is a true and correct copy of certain rules and regulations issued by the Accounting Department of this defendant, and denies all of the remaining allegations of paragraph 16 of said amended complaint.

17. This defendant admits that the quotations set forth in paragraph 17, pages 10 and 11, of said amended complaint, are true and correct copies of paragraphs 5-N-5 and 5-N-6 of said agreement between this defendant and its yard conductors, road and yard brakemen, baggagemen, assistant conductors or ticket collectors and switch tenders, dated August 14, 1942, and denies all of the remaining allegations of paragraph 17 of said amended complaint.

18. This defendant admits that at the time of the making and signing of said agreement, dated August 14, 1942, and ever since said time and at the present time, said agreement of August 1, 1921, as amended April 1, 1927, was and still is in full force and effect as

an agreement between this defendant and its road conductors and admits that the quotation appearing in paragraph 18, on page 12 of said amended complaint, is a true and correct copy of paragraph "5-F-1" of said agreement of August 1, 1921, as amended April 1, 1927; and this defendant denies all of the remaining allegations of paragraph 18 of said amended complaint.

19. This defendant denies the allegations of paragraph 19 of said amended complaint.

20. Answering paragraph 20 of said amended complaint, this defendant reiterates its answers to each of paragraphs numbered 1 to 19, inclusive, as hereinabove set forth, with like effect as if here fully repeated.

21. This defendant admits that after the entry of the United States in the present war, there was an increase in passenger traffic over the lines of this defendant, and this defendant denies all of the remaining allegations of paragraph 21 of said amended complaint.

22. This defendant admits the allegations of paragraph 22 of said amended complaint.

23. This defendant admits that certain proposals with respect to working conditions for road conductors and for yard conductors, road and yard brakemen, baggagemen, assistant conductors or ticket collectors and switch tenders, were submitted to it by representatives of the ORC and BRT on or about April 9, 1942, and this defendant denies all of the remaining allegations of paragraph 23 of said amended complaint.

24. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that during July, 1942, the BRT filed with the National Railroad Adjustment Board certain claims asserting that road brakemen who had assisted road conductors in the taking of tickets were entitled to be compensated at the rate of pay of "Assistant Conductors or Ticket Collectors" rather than at the rate of pay for road brakemen; this defendant alleges that it received no notice of any such claims having been

filed with the said National Railroad Adjustment Board, or with any other Agency or Tribunal, and therefore, upon information and belief, denies that such claims were filed against it; and this defendant denies all of the remaining allegations of paragraph 24 of said amended complaint.

25, 26 and 27. This defendant denies the allegations of paragraphs 25, 26 and 27 of said amended complaint.

28. This defendant admits that Exhibit "F", attached to said amended complaint, is a true and correct copy of a letter, dated August 17, 1942, addressed by the four General Managers of this defendant to Messrs. H. F. Sites and U. D. Hartman, General Chairman of the BRT, and this defendant denies all of the remaining allegations of paragraph 28 of said amended complaint.

29 and 30. This defendant denies the allegations of paragraphs 29 and 30 of said amended complaint.

31. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations relating to representations made by the BRT to the ORC and to the solicitation by the BRT of authorization cards, and this defendant denies that it conspired or confederated with the BRT, as alleged in paragraph 31 of said amended complaint, or in any manner whatsoever.

32. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 32 of said amended complaint.

33. This defendant denies the allegations of paragraph 33 of said amended complaint.

34. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 34 of said amended complaint.

35. Answering paragraph 35 of said amended complaint, this defendant reiterates its answers to each of paragraphs numbered 1 to 34, inclusive, as herein-

above set forth, with like effect as if here fully repeated.

36, 37, 38, 39, 40, 41 and 42. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 36, 37, 38, 39, 40, 41 and 42 of said amended complaint.

43. This defendant admits the allegations of paragraph 43 of said amended complaint.

44. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations relating to the alleged failure and refusal of the National Mediation Board to perform its duties, and denies all of the remaining allegations of paragraph 44 of said amended complaint.

45. This defendant denies the allegations of paragraph 45 of said amended complaint.

FOURTH DEFENSE

For further answer to said amended complaint, this defendant alleges that this Court is without power or authority to grant the prayers thereof, for the following reasons:

1. The granting by this Court of the prayers of said amended complaint numbered 1, 2(a) and (b), 5, 6, 7, and 8, is prohibited by the provisions of the so-called Norris-LaGuardia Act (Act of March 23, 1932, c. 90, Secs. 1-15; 47 Stat. 70-73; 29 U.S.C.A. Sec. 101-115), and particularly Sec. 7 thereof (Act of March 23, 1932, c. 90, Sec. 7; 47 Stat. 71; 29 U.S.C.A. Sec. 107); and

2. The allegations of said amended complaint do not state a claim upon which the declaratory judgments sought in prayers numbered 3 and 4 therein can be granted, for the reason that said allegations fail to show the existence of an actual controversy between the plaintiff and this defendant.

McKENNEY, FLANNERY & CRAIGHILL
 By **R. A. BOGLEY**

*Attorneys for defendant, The Pennsylvania
 Railroad Company*

Hibbs Building, Washington, D. C.

Of Counsel:

JOHN DICKINSON

GUY W. KNIGHT

Copy of the foregoing answer acknowledged this
 27th day of January, 1943.

RUFUS G. POOLE

V. C. SHUTTLEWORTH

Attorneys for Plaintiffs.

ROBERT L. PIERCE

EDWARD DUMBAULD

*Attorneys for defendants, National
 Mediation Board, George A. Cook
 and David J. Lewis.*

BERNARD M. SAVAGE

ALFRED L. BENNETT

*Attorneys for defendant, Brother-
 hood of Railroad Trainmen.*

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

ORDER OF RAILWAY CONDUCTORS
OF AMERICA, et al., *Plaintiffs*,

v.

THE NATIONAL MEDIATION BOARD,
et al., *Defendants*,**Civil Action
No. 17,899****ANSWER OF NATIONAL MEDIATION BOARD**

Come now the National Mediation Board and George A. Cook, its chairman, defendants in the above-entitled cause, and for answer to the amended complaint therein, say:

COUNT I

1. These defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 1 through 6, inclusive, of the complaint and, therefore, neither admit nor deny the same; except that they admit that the plaintiff Order of Railway Conductors of America (hereinafter sometimes referred to as O. R. C.) and the defendant Brotherhood of Railway Trainmen (hereinafter sometimes referred to as B. R. T.) are labor organizations eligible to serve as representative of employees of a carrier under the terms of the Railway Labor Act as amended, and that the defendant Pennsylvania Railroad Company (hereinafter sometimes referred to as P. R. R.) is a carrier subject to the provisions of the said act.

2. The allegations of paragraphs 7, 8, and 9 of the complaint are admitted, except that these defendants allege that the resignation of the defendant David J. Lewis as a member of the National Mediation Board became effective on the last day of January, 1943, and these defendants therefore suggest the dismissal of the complaint and all proceedings herein with respect to the said defendant David J. Lewis.

3. These defendants neither admit nor deny the allegations contained in paragraph 10 of the complaint, which are conclusions of law.

4. With respect to the allegations of paragraph 11 of the complaint, these defendants are without knowledge or information sufficient to form a belief as to the truth thereof and therefore neither admit nor deny the same except that the defendants deny that at this time the O. R. C. is the duly accredited and recognized representative and bargaining agent for the craft and class of road conductors on the P. R. R. but allege that on the contrary the National Mediation Board on December 27, 1942, certified that the B. R. T. has been duly designated and authorized to represent the craft or class of road conductors on the P. R. R. for the purposes of the Railway Labor Act, a copy of said certification being attached hereto and incorporated by reference herein as Exhibit A to this Answer.

5. These defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 12, 13, 14, 15, 16, 17, 18, and 19 of the complaint, and therefore neither admit nor deny the same.

COUNT II

6. In answer to paragraph 20 of the complaint, these defendants repeat and reallege each and every allegation hereinabove contained in answer to paragraphs numbered 1 to 19, inclusive, of the complaint.

7. These defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 21 to 33, inclusive, of the complaint, and therefore neither admit nor deny the same.

8. With respect to the allegations of paragraph 34 of the complaint, these defendants admit and allege that on or about September 21, 1942, the National Mediation Board received an Application dated September 18, 1942, filed by B. R. T. pursuant to the provisions of Section 2 (ninth) of the Railway Labor Act as amended, invoking the services of said board to investigate a dispute among the employees of the P. R. R. and to certify the names of the duly designated and authorized representatives of the employees involved in the dispute; and that, pursuant to the said statutory provisions, the National Mediation Board did duly conduct such an investigation and hold an election and take a secret ballot of the employees among the craft or class of road conductors involved and utilize appropriate methods of ascertaining the names of the duly designated and authorized representatives of the said employees in such manner as insured the choice of representatives by the said employees without interference, influence, or coercion exercised by the carrier, and did on December 27, 1942, certify the Brotherhood of Railroad Trainmen as the duly designated and authorized representatives of said craft or class, a copy of which certification is attached hereto and incorporated by reference herein as Exhibit A to this Answer.

COUNT III

9. In answer to the allegations of paragraph 35 of the complaint, these defendants repeat and reallege each and every allegation hereinabove contained in answer to paragraphs numbered 1 to 35, inclusive, of the complaint.

10. In answer to the allegations of paragraphs 36 to 40, inclusive, these defendants admit receipt by the National Mediation Board on or about October 30, 1942, of a written communication dated October 28, 1942, of which Exhibit G to the complaint is a true and correct copy; to which communication the National Mediation Board replied on or about November 9, 1942, of which reply Exhibit H to the complaint is a true and correct copy; which said Exhibits G and H speak for themselves.

11. These defendants neither admit nor deny the allegations contained in paragraphs 41 and 42 of the complaint, as they are conclusions of law.

12. In answer to paragraph 43 of the complaint, these defendants admit that the National Mediation Board, pursuant to the provisions of law, did conduct an election and take a secret ballot of the employees involved and did issue a certification, of which Exhibit A hereto is a true copy, all of which more particularly appears in the allegations of paragraph 8 hereinabove.

13. In answer to paragraph 44 of the complaint, these defendants deny that the said election and the said certification are illegal, invalid, null and void; and allege that the failure of the National Mediation Board to determine the questions relative to the charges of unfair labor practices on the part of the P. R. R. referred to in said paragraph 44 of the complaint, assuming that the said board had jurisdiction to determine such questions, did not invalidate the said election and the said certification; and allege that the said election and the said certification cannot be set aside unless it can be shown that coercion by the P. R. R. actually resulted in the loss of the said election by the O. R. C. These defendants further allege that this Court has jurisdiction to try *de novo* such issues, and is not required, and plaintiffs do not seek, to remand the case to the National Mediation Board for a hearing to be held by said board on such

issues, assuming that said board has jurisdiction thereof; and these defendants further say that they will stand neutral before this Court with respect to such issues, in view of the fact that the said Board has not passed upon said issues, and that these defendants will accept and be bound by whatever determination this Court may reach with respect to said issues, and that their future action, if any, will be taken in accordance with such determination by this Court.

14. These defendants neither admit nor deny the allegations contained in paragraph 45 of the complaint for the reason that they are conclusions of law, and these defendants deny that, unless it be adjudged and decreed that said election and certification are of no force and effect and a nullity and such other relief be granted as prayed for in the complaint, plaintiffs will suffer irreparable damage, loss and injury.

WHEREFORE, having fully answered the amended complaint herein, these defendants pray that the relief prayed for by the plaintiffs be denied and that the complaint be dismissed.

ROBERT L. PIERCE,
EDWARD DUMBAULD,

*Special Assistants to the Attorney General.
Attorneys for Defendant National Media-
tion Board and George A. Cook.*

THURMAN ARNOLD
Assistant Attorney General

EDWARD M. CURRAN
*United States Attorney for the
District of Columbia*

I hereby certify that I have this day mailed copies of the foregoing answer to the following persons:

Rufus G. Poole, Esq.
815 Fifteenth St., N. W.
Washington, D. C.
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521-529 Title Bldg.
Baltimore, Md.

ROBERT L. PIERCE

*Special Assistant to the Attorney General
Department of Justice
Washington, D. C.*

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

ORDER OF RAILWAY CONDUCTORS
OF AMERICA, et al., *Plaintiffs,*

v.

NATIONAL MEDIATION BOARD, et al.,
*Defendants.***Civil Action
No. 17,899****MOTION FOR SUMMARY JUDGMENT**

Now comes the Order of Railway Conductors of America, et al., plaintiffs in the above-entitled cause, by Rufus G. Poole, their attorney, and moves the Court to enter summary judgment for the plaintiffs in accordance with rule 56 of the Federal Rules of Civil Procedure, granting relief against the defendants, National Mediation Board, and George A. Cook, a member of the Board, as follows:

1. That the election conducted from December 5 to December 19, 1942, by the National Mediation Board, on the Pennsylvania Railroad, among the craft or class of road conductors, and the certificate issued December 27, 1942, by the National Mediation Board, certifying "that the Brotherhood of Railroad Trainmen has been duly designated and authorized to represent the craft or class of road conductors, employed by the Pennsylvania Railroad Company, for the purposes of the Railway Labor Act" be annulled, vacated, and set aside.

2. That the National Mediation Board and George A. Cook, a member of the Board, each of

them and their officers and employees be restrained and enjoined from holding an election or from utilizing any other method of ascertaining the bargaining representative for the craft or class of road conductors on the Pennsylvania Railroad Company, until the Board has investigated and considered the unfair labor practices, complained of in the amended complaint against the Pennsylvania Railroad Company, and until such time as the Board finds and determines after hearing that the unfair labor practices, complained of in said amended complaint, have ceased or will not interfere, influence, or coerce the craft or class of road conductors in their choice of a bargaining representative.

Attached is an affidavit of H. W. Fraser, President of the Order of Railway Conductors, setting forth facts in support of this motion showing that there is no genuine issue as to any material fact with respect to the relief prayed for, and that the plaintiffs are entitled to a summary judgment as a matter of law.

Rufus G. Poole
815 15th Street, N. W.
Washington, D. C.

V. C. Shuttlesworth
Merchants Bank Bldg.
Cedar Rapids, Iowa
Attorneys for Plaintiffs.

I hereby certify that copies of the foregoing Motion for Summary Judgment in the above-entitled cause were mailed, postage prepaid, this 8th day of March, 1943, to the following attorneys for defendants:

ROBERT L. PIERCE, Esquire
 EDWARD DUMBAULD, Esquire
 Special Assistants to the Attorney General
 Department of Justice
 Washington, D. C.

*Attorneys for Defendants,
 National Mediation Board, and
 George A. Cook.*

BERNARD M. SAVAGE, Esquire
 521 Title Building
 Baltimore, Maryland
 ALFRED L. BENNETT, Esquire
 1010 Vermont Avenue, N. W.
 Washington, D. C.

*Attorneys for Brotherhood of
 Railroad Trainmen.*

R. A. BOGLEY, Esquire
 901 Hibbs Building
 Washington, D. C.

*Attorney for Pennsylvania
 Railroad Company.*

Rufus G. Poole
 815 15th Street, N. W.
 Washington, D. C.
Attorney for Plaintiffs.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

ORDER OF RAILWAY CONDUCTORS
OF AMERICA, et al., *Plaintiffs*,

v.

Civil Action

No: 17,899.

THE NATIONAL MEDIATION BOARD,
et al., *Defendants*.**AFFIDAVIT IN SUPPORT OF PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT**WASHINGTON
DISTRICT OF COLUMBIA } ss.

H. W. Fraser, being duly sworn, deposes and says:

1. That he is one of the plaintiffs in the above-entitled cause.

2. That he is and has been for more than a year President of the Order of Railway Conductors of America (referred to as the "ORC"), one of the plaintiffs in this cause, and has been active in the conduct of the affairs of said union, and is familiar with the matters complained of by the plaintiffs in the amended complaint.

3. Affiant refers to amended complaint herein for a more particular statement of the claims in this case.

4. Affiant believes that there is no genuine issue as to any material fact relevant to the summary judgment sought in the motion; that plaintiffs are entitled to judgment as a matter of law; and that the uncontested facts justifying a summary judgment are as herein-after set forth.

5. That on or about September 23, 1942, the Brother-

hood of Railway Trainmen (referred to as the "BRT") invoked the services of the National Mediation Board (referred to as the "Board") to be certified as the duly accredited representative of the craft and class of road conductors employed by the Pennsylvania Railroad Company (referred to as the "Penn RR").

6. That at the time of the BRT invocation, the ORC was the duly accredited and recognized representative and bargaining agency for the craft and class of road conductors on the Penn RR.

7. That the ORC on October 28, 1942, filed a protest with the Board against the holding of an election "at this time" among the craft or class of road conductors of the Penn RR on the ground that the Penn RR had committed certain acts, which unlawfully interfered with, influenced, and coerced the said conductors in their choice of a bargaining representative.

8. That the ORC also requested the Board to hold a hearing on said charges against the Penn RR.

9. That said protest and the first request for a hearing are contained in plaintiffs' Exhibit "G" to the amended complaint, a copy of which is attached hereto and incorporated herein.

10. That a second request for a hearing on said charges of interference by the Penn RR was made orally by representatives of the ORC on or about November 13, 1942.

11. That the Board denied the requests of the ORC for a hearing in a letter dated November 9, 1942, and signed by Mr. Robert F. Cole, Secretary of the Board, the text of which letter is plaintiffs' Exhibit "H", of the amended complaint, which is attached hereto and incorporated herein.

12. The Board admits in its answer that Exhibits "G" and "H" represent true and correct copies of the aforesaid communications which were exchanged between

the ORC and the Board, but pleads that these documents speak for themselves.

13. That affiant verily believes that Exhibit "H" shows that the denial of the request of the ORC for a hearing was based upon the fact that the Board was under the mistaken view that it had no jurisdiction or power to consider the charges of the ORC under the authority granted it by the Railway Labor Act to investigate and determine a representation dispute.

14. That the Board held no hearing or investigation to determine whether the ORC charges of interference against the Penn RR were true.

15. That the Board ordered an election amongst the craft and class of road conductors on the Penn RR for the purpose of determining the bargaining representative of such craft and class, which election was conducted from December 5 to December 19, and on December 27, 1942, the Board certified that the BRT had been duly designated and authorized to represent the class or craft of road conductors, employed by the Penn RR Company.

16. That the foregoing facts alleged in the amended complaint are not denied by the Board in its answer; such facts are either admitted by the Board, substantiated by Exhibits "G" and "H", which are attached hereto and made a part hereof (the correctness of which documents is admitted by the Board), or remain unanswered by the Board.

17. Affiant believes that the only question presented by the foregoing facts is one of law which should be determined by rule 56 of the Federal Rules of Civil Procedure.

18. That the principal question of law raised by the foregoing facts is whether the Board acted arbitrarily, unreasonably, unlawfully, and mistakenly as to its duties in failing and refusing to consider the charge of carrier interference against the Penn RR before con-

ducting an election and issuing a certification that the BRT was the representative of the road conductors employed by the Penn RR, and, consequently, whether the election and certification aforesaid are illegal, invalid, and null and void.

19. Affiant further says that he is competent to testify to the matters above stated, and that he has personal knowledge of the facts to which he has sworn except those matters which he has stated upon belief.

WHEREFORE affiant prays that judgment be ordered for the plaintiffs and against the defendant, National Mediation Board, as requested in the Motion for Summary Judgment to which this is attached.

H. W. FRASER,

Affiant

O. R. C. Building

Cedar Rapids, Iowa

Subscribed and sworn to before me this 24th day of February, 1943.

HELEN C. TUGENDHOFT,

Notary Public

I hereby certify that copies of the foregoing Affidavit in Support of Plaintiffs' Motion for Summary Judgment in the above-entitled cause were mailed, postage prepaid, this 8th day of March, 1943, to the following attorneys for defendants:

ROBERT L. PIERCE, Esquire

EDWARD DUMBAULD, Esquire

Special Assistants to the Attorney General
Department of Justice

Washington, D. C.

Attorneys for Defendants,

National Mediation Board, and

George A. Cook.

BERNARD M. SAVAGE, Esquire
521 Title Building
Baltimore, Maryland

ALFRED L. BENNETT, Esquire
1010 Vermont Avenue, N. W.
Washington, D. C.

*Attorneys for Brotherhood of
Railroad Trainmen.*

R. A. BOGLE, Esquire
901 Hibbs Building
Washington, D. C.

*Attorney for Pennsylvania
Railroad Company.*

RUFUS G. POOLE

Attorney for Plaintiffs
815 15th Street, N. W.
Washington, D. C.

IN THE
DISTRICT COURT OF THE UNITED STATES
 FOR THE DISTRICT OF COLUMBIA

ORDER OF RAILWAY CONDUCTORS
 OF AMERICA, et al., *Plaintiffs,*

v.

THE NATIONAL MEDIATION BOARD,
 et al., *Defendants.*

Civil Action
 No. 17,899

**AMENDED ANSWER OF NATIONAL
 MEDIATION BOARD**

Come now the National Mediation Board and George A. Cook, its chairman, defendants in the above-entitled cause, and with the consent of counsel for the plaintiffs, make the following amendments to their answer to the amended complaint therein and in all other respects re-iterate their original answer:

1. Amend paragraph 11 (p. 4) of the answer to read:

These defendants deny the allegations contained in paragraphs 41 and 42 of the complaint.

2. Amend paragraph 13 (p. 4) of the answer to read:

In answer to paragraph 44 of the complaint, these defendants deny that the said election and the certification are illegal, null and void; they deny that the Board, in not determining whether the labor practices charged to the Pennsylvania Railroad would interfere with, influence or coerce the craft or class of road conductors in their choice of a bargaining representative, was failing to per-

form its statutory duty; they deny that the practices complained of constitute in fact unlawful coercion. For further answer these defendants allege: That the Board determined on the basis of the facts furnished by plaintiff Order of Railway Conductors, but without a hearing, that the instant charges did not allege carrier coercion directly affecting and occurring during the actual conduct of the election and that the Board therefore, as a matter of law, had no jurisdiction to consider the validity of these charges on the merits; that the Board was not required by the Constitution or the Railway Labor Act to hold a hearing to make such a determination; that this Court has jurisdiction to consider the validity of these charges on the merits on evidence *de novo*; that in view of the fact that the Board has not passed upon and is not authorized to pass upon the validity of these charges on the merits, these defendants will stand neutral before this Court with respect to such issues.

ROBERT L. PIERCE

Special Assistant to the

Attorney General

Counsel for defendants

*National Mediation Board
and George A. Cook.*

TOM C. CLARK

Assistant Attorney General.

EDWARD M. CURRAN

United States Attorney.

I consent:

RUFUS G. POOLE

Counsel for plaintiffs.

May 11, 1943.

APPENDIX A

National Mediation Board
Washington

George A. Cook, Chmn.
Otto S. Beyer
David J. Lewis
Robert F. Cole, Secy.

In the matter of
REPRESENTATION OF EMPLOYEES
of the
PENNSYLVANIA RAILROAD
Road Conductors

Case No. R-972

Certification

Dec. 27, 1942

The services of the National Mediation Board were invoked by the Brotherhood of Railroad Trainmen to settle a dispute as to who may represent the following employees of the Pennsylvania Railroad, for the purposes of the Railway Labor Act, as provided by Section 2, Ninth, thereof:

Road conductors.

The records of the Board show that at the time application was received these employees were represented by the Order of Railway Conductors.

The Board assigned Mr. James P. Kiernan, Mediator, to investigate, and after finding that a dispute existed among the employees concerned, directed him to take a secret ballot to determine their choice, using an eligible list agreed to by representatives of the contesting organizations. Following is the result of the election as reported by Mediator Noonan, who was directed to count the ballots:

Number of employees voting for contesting organizations:

	For Brother- hood of Rail- road Trainmen	For Order of Railway Conductors	For Other Organ- izations or Individuals	Void Ballots	Number of Employees Eligible to Vote
Road Con- ductors	1680	1122	8	81	3283

On the basis of the investigation and report of election the National Mediation Board hereby certifies that the Brotherhood of Railroad Trainmen has been duly designated and authorized to represent the following craft or class of employees of the Pennsylvania Railroad, for the purposes of the Railway Labor Act:

Road conductors.

By order of NATIONAL MEDIATION BOARD.

Robert F. Cole
Secretary

IN THE
DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

ORDER OF RAILWAY CONDUCTORS
 OF AMERICA, et al., *Plaintiffs*,

v.

Civil Action
 No. 17,899

NATIONAL MEDIATION BOARD,
 BROTHERHOOD OF RAILROAD
 TRAINMEN, et al., *Defendants*.

**ANSWER TO MOTION FOR SUMMARY
 JUDGMENT**

Now comes the Brotherhood of Railroad Trainmen, by Bernard M. Savage and Alfred L. Bennett, their Attorneys, Answering Motion for Summary Judgment made by the Plaintiffs under Rule 56 of the Federal Rules of Civil Procedure and says:

1. That under Rule 56 of the Federal Rules of Civil Procedure, upon which the Plaintiffs rely, they are not entitled to summary judgment and injunction prayed in paragraph 2 of said motion, because Rule 56 contains no provision for injunctive relief in a motion for summary judgment.

2. That the Plaintiffs are not entitled to the relief asked in paragraph one, because, among other reasons, their active participation in the representation election as well as their subsequent course of action constitutes an abandonment and waiver.

3. That the National Mediation Board on December 27, 1942, certified the Brotherhood of Railroad Trainmen: "has been duly designated and authorized to represent the following craft or class of employees of the

Pennsylvania Railroad, for the purposes of the Railway Labor Act: Road Conductors", and that it is evident the Board carefully considered the alleged unfair labor practices and that it will appear by reference to Plaintiffs' Exhibit "H", the Board found the Order of Railway Conductors charges without merit (Plaintiffs' Exhibit "G"), stating on page 5 of its letter which was a reply to Exhibit "G": "If you have in mind a formal hearing at which the interested parties would be present, we find nothing in the matters alleged in your protest which falls within the purview of a formal hearing customarily held in connection with representation disputes", and which reply also considered the nature of certain charges and pointed out provisions of Section 3 may be made effective through the application of Section 10 of the Act and that the reply of the Board further pointed out—*with which this Defendant agrees*—that "where the question of representation is raised it is extremely difficult to negotiate rules until the representation question is settled", and that the Board found it was its duty to proceed with the investigation when its services had been properly invoked.

4. That a consideration of the Amended Bill of Complaint and Exhibits clearly shows that the alleged coercion and unfair labor practices are non-existent.

Attached is the affidavit of H. F. Sites, General Chairman of the Brotherhood of Railroad Trainmen for the Pennsylvania Lines East, setting forth the facts which this Defendant believes shows that charges made by the Plaintiffs are trivial, without merit, that the relief asked is for the purpose of delay and not made in good faith.

WHEREFORE, this Defendant prays that the Plaintiffs' Motion for Summary Judgment be denied.

BERNARD M. SAVAGE

521 Title Building
Baltimore, Maryland

ALFRED L. BENNETT,
Denrike Building
Washington, D. C.
*Attorneys for Defendant,
Brotherhood of Railroad
Trainmen.*

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

ORDER OF RAILWAY CONDUCTORS
OF AMERICA, et al., *Plaintiffs*,

v.

**Civil Action
No. 17,899**NATIONAL MEDIATION BOARD,
BROTHERHOOD OF RAILROAD
TRAINMEN, et al., *Defendants*.**AFFIDAVIT BY DEFENDANT BROTHERHOOD
OF RAILROAD TRAINMEN IN OPPOSITION TO
PLAINTIFFS' MOTION FOR SUMMARY JUDG-
MENT**CITY OF BALTIMORE
STATE OF MARYLAND

H. F. Sites, being duly sworn, deposes and says:

That he is the General Chairman of the Brotherhood of Railroad Trainmen for the Pennsylvania, Lines East, having acted in this capacity for more than three years; that the class of employees involved within the dispute come under the section of the Pennsylvania Railroad within his jurisdiction and that of U. D. Hartman, General Chairman of the Brotherhood of Railroad Trainmen, for the Pennsylvania, Lines West; that he is familiar with the allegations made by the plaintiffs and the matters and facts contained herein in denial thereof.

Answering plaintiffs' affidavit in the respective order of said allegations, this affiant says:

1. Admitted.

2. Does not have sufficient knowledge of the allegations therein contained to form a belief for the truth thereof and therefore neither admits nor denies the same.

3. Requires no answer but affiant refers to answer of the Brotherhood of Railroad Trainmen to plaintiffs' amended bill of complaint, to plaintiffs' exhibits and defendant Brotherhood of Railroad Trainmen's exhibits "A" to "G" inclusive, filed herewith, for a denial of plaintiffs' claims.

4. This affiant has no knowledge as to the plaintiffs' affiant's belief and therefore can neither admit nor deny the same but denies his conclusions.

5. Admitted.

6. Admits that at the time of Brotherhood of Railroad Trainmen invocation the Order of Railway Conductors was the duly accredited and recognized bargaining agency and representative for the class and craft of road conductors on the Pennsylvania Railroad, but says that for many years, because of the closeness of interests, the Order of Railway Conductors and Brotherhood of Railroad Trainmen, had jointly negotiated with the Pennsylvania Railroad regarding their respective contracts and that both the Brotherhood of Railroad Trainmen and the Order of Railway Conductors were parties to said contracts. (Plaintiffs' Exhibit "A".)

7. Admits that Exhibit "G" purports to be a copy of letter filed by the plaintiffs with the Mediation Board on October 28, 1942, and states said letter speaks for itself.

8. Does not have sufficient knowledge to either admit nor deny whether or not the Order of Railway Conductors requested the Board to hold a hearing, but says that the concluding sentence of exhibit "G", which purports to be a letter addressed to the Board dated October 28, 1942, states as follows: "We shall be pleased

to present further evidence in support of what we have here stated and request that we be afforded an opportunity to be heard".

9. Neither admits nor denies this paragraph but states Exhibit "G" speaks for itself.

10. Does not have sufficient knowledge to enable him to admit nor deny the allegations of this paragraph.

11. Admits that Exhibit "H" purports to be a true copy of the letter addressed by Robert F. Cole, Secretary, National Mediation Board to H. W. Fraser, President of the Order of Railway Conductors.

12. Neither admits nor denies the allegations of this paragraph and says the answer of the Board speaks for itself.

13. Does not have sufficient knowledge as to what the plaintiff affiant believes exhibit "H" shows, to either admit nor deny the same, but states exhibit "H" speaks for itself.

14. Does not have sufficient knowledge of the allegations of said paragraph to either admit nor deny the same, but admits he has no knowledge of such hearing.

15. Admitted and says the plaintiffs actively participated in said election.

16. Denies the allegations therein contained and says that the answer and exhibits speak for themselves.

17. Does not have sufficient knowledge of the belief of the plaintiff affiant to either admit nor deny his mental processes in this regard but denies the only question presented is one of law, as alleged.

18. Denied.

19. This affiant does not have sufficient knowledge of the allegations contained therein to either admit nor deny.

Affiant further says that he believes the striking out of the election and certification of the Mediation Board, both of which plaintiff, Order of Railway Conductors,

certified were conducted fairly and impartially and in which the plaintiff actively participated and made no application to this court to have stricken out until after a certification would be contrary to the intent and spirit of the Railway Labor Act and would leave approximately three thousand road conductors without a representative of their own choosing and would be productive of widespread unrest, chaos and confusion among said conductors.

Affiant further says that he is competent to testify as to the matters above stated; that he has personal knowledge of the facts to which he has sworn except those matters which he has stated upon belief.

WHEREFORE this affiant prays on behalf of the Brotherhood of Railroad Trainmen, one of the defendants, that the motion for summary judgment requested by the plaintiff, be denied.

H. F. SITES,

Affiant,

1011 City Centre Building,
Philadelphia, Pennsylvania.

Subscribed and Sworn to before me this twenty-fourth day of March, 1943.

Notary Public.

EXHIBIT "D"

NATIONAL MEDIATION BOARD CASE NO. R-972 AGREEMENT

It is hereby agreed by and between the Order of Railway Conductors and the Brotherhood of Railroad Trainmen, parties to the National Mediation Board's Case No. R-972, known as representation dispute among Road Conductors, employees of the Pennsylvania Railroad, by their respective duly authorized and designated representatives, THAT,

1. To settle the dispute, should the National Mediation Board find that a dispute exists among the Road Conductors, employees of the Pennsylvania Railroad, and order an election, the eligible list of such Road Conductors entitled to vote in such an election shall be:

- (a) Such Road Conductors as held regular assignments during the last half of September 1942,
- (b) Such Road Conductors as were assigned to the regular Extra Conductors list, during the last half of September 1942,
- (c) Such Road Conductors as worked a preponderance of time as Road Conductor, during the months of April, May, June, July, August and September, 1942, (those working an equal amount in such months, in the capacity of Road Conductor and in other occupations, shall not be eligible to vote),
- (d) Those who were on leave of absence, sick or injured leave, or other authorized leave during September 1942, provided their seniority would give them the right to qualify under (a) or (b) above,
- (e) Those in the armed forces of the United States, provided they qualify under (a), (b) and (d) above.

2. Those who qualify under the provisions above, but have since been dismissed, resigned, retired or promoted shall not be eligible to vote;

3. The parties hereto, shall appoint one man each to make a study of the work performed by the Conductors in the "Altoona Yard and Branch Pool", who will make a joint report to the Mediator and the eligibility of Conductors will be decided later.

4. Should a ballot be taken, the name of the Order of Railway Conductors shall be first on the ballot.

5. That a list prepared in accordance with this agreement, from the payroll and other records of the Pennsylvania Railroad, shall constitute the eligible list, and no changes shall be made in such list except upon proof of error in the list.

Signed this 20th day of November 1942, at Philadelphia, Pa.

For ORDER OF RAIL-
WAY CONDUCTORS

By B. C. JOHNSON

By C. E. KALKMAN

By J. E. MAGILL

For BROTHERHOOD OF
RAILROAD TRAINMEN

By W. P. KENNEDY

By H. F. SITES

By U. D. HARTMAN

Witness: JAMES P. KIERNAN

Mediator.

EXHIBIT "E"

Case No. R-972, Representation Dispute Among
Road Conductors, Employees of the Pennsylvania Rail-
road

Philadelphia

December 2, 1942

The undersigned parties to representation dispute among Road Conductors, employees of the Pennsylvania Railroad have inspected and hereby agree to the list of eligible voters to be used in conducting an election by the National Mediation Board in its case file R-972, as prepared by Mediator J. P. Kiernan. It is agreed that changes in the eligible list of voters as referred to herein

will be made only to correct error as provided in the rules governing the election.

For: ORDER OF RAIL-
WAY CONDUCTORS

By B. C. JOHNSON
M. H. BARNEY

For: BROTHERHOOD OF
RAILROAD TRAINMEN

By W. P. KENNEDY
H. F. SITES

Witnessed:

JAMES P. KIERNAN

Mediator

EXHIBIT "f"

NATIONAL MEDIATION BOARD WASHINGTON

REPORT OF ELECTION RESULTS, R-972

National Mediation Board,
Washington, D. C.

In accordance with instructions, a secret ballot was taken to settle the representation dispute among the Road Conductors employees of the Pennsylvania Railroad.

Ballots were distributed to and voted by the said employees from December 5, 1942, to December 19, 1942, said ballots being collected and counted by a representative of the National Mediation Board in the presence of the party observers.

The mediator and the observers met in the City of Philadelphia, Pennsylvania, on the 19th day of December, 1942, and jointly opened, counted, and allocated all the ballots in their possession, and, as evidence thereof prepared the following tabulation to which the

party observers attest hereon as to the secrecy, fairness and accuracy of all ballots cast:

Number of employes on list of eligible voters	3283
Number voting for representation by the Order of Railway Conductors	1122
Number voting for representation by the Brotherhood of Railroad Trainmen	1680
Number voting for other organization or in- dividual	8
Number of void ballots not allocated to any party	81

In compliance with paragraph 19 of the Board's instructions, I hereby report the foregoing results to be true and the election completed.

Signed at Philadelphia, Pennsylvania, this 19th day of December, 1942.

Board's Certification should be mailed to:

Mr. H. A. Enochs, Ch. of Personnel, Penn. RR, Philadelphia, Pa.

Mr. H. W. Fraser, Pres. ORC, Cedar Rapids, Iowa.

Mr. A. H. Whitney, Pres. BRT, BRT Bldg., Cleveland, Ohio.

J. JOSEPH NOONAN,

Mediator, National Mediation Board.

ATTEST:

We, the party observers, present at the counting and tabulation of the votes in the above mentioned case, hereby certify that the election reported above was conducted in a fair and impartial manner, and that the secrecy of the ballots was kept inviolate and the count and tabulation is accurate and complete.

Signed at Philadelphia, Pa., this 19th day of December, 1942.

B. C. JOHNSON

*Party Observer, for the
Order of Railway
Conductors.*

C. E. KALKMAN

O. R. C.

J. E. MAGILL

O. R. C.

W. P. KENNEDY

*Party Observer, for the
Brotherhood of Rail-
road Trainmen.*

H. F. SITES

B. R. T.

U. D. HARTMAN

B. R. T.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

ORDER OF RAILWAY CONDUCTORS
OF AMERICA, et al., *Plaintiffs,*

v.

NATIONAL MEDIATION BOARD, et al.,
Defendants.

Civil

No. 17,899

JUDGMENT AND ORDER

The above-entitled case, having come on for hearing on plaintiffs' motion for a summary judgment; and the Court having considered the motion, defendants' answers thereto, affidavits of the parties, the pleadings and oral argument of counsel; and the Court being of the opinion that there is no genuine issue as to any material fact with respect to the relief requested under the motion for summary judgment, but the Court being of the further opinion that the facts admitted as true and all other facts alleged in the complaint and amended complaint of the plaintiffs, do not establish that the plaintiffs have any cause of action; it is by the Court this 11th day of June, 1943,

ADJUDGED, ORDERED and DECREED:

1. That the plaintiffs' motion for a summary judgment be and the same is hereby denied;
2. That the complaint and the amended complaint be and the same are hereby dismissed;
3. That costs are awarded to defendants.

DANIEL W. O'DONAGHUE,

June 11, 1943.

Justice.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

ORDER OF RAILWAY CONDUCTORS
OF AMERICA, et al., *Plaintiffs*,

v.

NATIONAL MEDIATION BOARD, et al.,
Defendants.Civil
No. 17,899**NOTICE OF APPEAL**

Notice is hereby given this 14th day of June, 1943, that the Order of Railway Conductors of America, et al. hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 11th day of June, 1943, in favor of defendants against said plaintiffs.

RUFUS G. POOLE*Attorney for Plaintiffs*

815 15th Street, N. W.

Washington, D. C.

ALFRED L. BENNETT

1010 Vermont Avenue, N. W.

Washington, D. C.

ROBERT L. PIERCE

Department of Justice

Washington, D. C.

R. A. BOGLEY

901 Hibbs Building

Washington, D. C.

[fol. 92] [Stamp:] United States Court of Appeals for the District of Columbia. Filed Dec. 21, 1943. Joseph W. Stewart, Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, OCTOBER TERM, 1943

No. 8571

ORDER OF RAILWAY CONDUCTORS, et al., Appellants,

NATIONAL MEDIATION BOARD, et al., Appellees

MOTION TO DISMISS APPEAL AS TO MEDIATION BOARD AND ITS MEMBERS FOR LACK OF JURISDICTION

Now comes the National Mediation Board and its individual members, appellees herein, and move this Court to dismiss the appeal as against them.

The ground of this motion is that, so far as they are concerned, neither the District Court of the United States for the District of Columbia nor this Court on appeal has jurisdiction over the subject matter involved in the present case. The present suit, so far as it involves the Board and its members, is a suit in equity to review and set aside a certification of the Board issued pursuant to section 2, ninth, of the Railway Labor Act (45 U. S. C. sec. 152, ninth). The Supreme Court's decision issued on November 22, 1943, subsequent to the taking of this appeal, in *Switchmen's Union of North America v. National Mediation Board*, 64 S. Ct. 98, clearly holds that the District Court and this Court have no jurisdiction to review certifications issued by the National Mediation Board. No motion for rehearing in the [fol. 93] *Switchmen's Union* case has been filed in the Supreme Court, and under the rules of that Court, the time for filing such a motion has now expired.

WHEREFORE: It is respectfully prayed that the appeal be dismissed as against these appellees at appellants' costs.

Robert L. Pierce, Special Assistant to the Attorney General, Department of Justice, Washington, D. C., Counsel for the National Mediation Board and its members.

Wendell Berge, Assistant Attorney General.

PROOF OF SERVICE

Whereby certify that I served a copy of the above motion upon each of the following counsel this 20th day of December, 1943, by mailing them a copy thereof:

Rufus G. Poole, Esquire, William A. Clineburg, Esquire, 815 15th St., N. W., Washington, D. C.;

V. C. Shurtleworth, Esquire, 1113 Merchants Bank Building, Cedar Rapids, Iowa;

R. Aubrey Bogley, Esquire, Hibbs Building, Washington, D. C.;

Alfred L. Bennett, Esquire, Denrike Building, 1010 Vermont Ave., Washington, D. C.;

Bernard M. Savage, Esquire, 521 Title Building, Baltimore, Maryland.

Robert L. Pierce, Special Assistant to the Attorney General.

[fol. 94] [Stamp:] United States Court of Appeals for the District of Columbia. Filed Feb. 3, 1944. Joseph W. Stewart, Clerk.

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 8571

ORDER OF RAILWAY CONDUCTORS OF AMERICA, et al.,
Appellants,

v.

NATIONAL MEDIATION BOARD, et al., Appellees

MOTION FOR LEAVE TO FILE THE FOLLOWING ANSWER TO THE
"MOTION TO DISMISS APPEAL AS TO THE MEDIATION BOARD
AND ITS MEMBERS FOR LACK OF JURISDICTION"

Now come the appellants herein and move this Court for leave to file the following answer to the motion to dismiss this appeal as to the National Mediation Board and its members, which motion was filed December 20, 1943.

The appellants have not heretofore filed an answer opposing the dismissal of this appeal as to the National Mediation Board and its members, because it has been assumed that under the Supreme Court's decisions of November 22, 1943,

in *General Committee of Adjustment of the Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R. Co., et al.*, 64 S. Ct. 146; *General Committee of Adjustment of the Brotherhood of Locomotive Engineers v. Southern Pacific Company, et al.*, and *General Grievance Committee of the Brotherhood of Locomotive Firemen and Enginemen v. General Committee of Adjustment of the Brotherhood of Locomotive Engineers, et al.*, 64 S. Ct. 142, the Federal Courts have no jurisdiction to inquire into the validity of any election conducted, or certification issued by the National Mediation Board in pursuance of its duties under Section 2, Ninth, of the Railway Labor Act (Act of May 20, 1926, 44 Stat. 577, as amended by the Act of June 21, 1934, 48 Stat. 1185, U. S. C. Title 45, Secs. 151 et seq.).

The appellants are presently of the opinion, however, that the said motion to dismiss this appeal as to the National Mediation Board and its members should be denied for two reasons: (1) It is not believed that the Supreme Court's decisions in the above-cited cases may properly be construed to mean that the Federal Courts never, under any circumstances, have jurisdiction to review action taken by the National Mediation Board under the purported authority of Section 2, Ninth, of the Railway Labor Act. (2) It is not clear that the decisions in the cited cases represent the present views of the Supreme Court, inasmuch as those cases were decided by a bare 4-3 majority, and inasmuch as Mr. Justice Rutledge dissented from the order entered January 10, 1943, denying a petition for rehearing which had been filed in the case of *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees v. United Transportation Service Employees of America*, No. 435, indicating that he does not necessarily subscribe to the views expressed by the majority in the decided cases.

WHEREFORE, it is respectfully prayed that the appellants be permitted to file the foregoing in answer to the motion to dismiss this appeal as to the Mediation Board and its members.

Rufus G. Poole, William A. Clineburg, 815 15th Street, N. W., Washington, D. C., V. C. Shuttleworth, Merchants National Bank Bldg., Cedar Rapids, Iowa, Attorneys for Appellants.

[fol. 96] The National Mediation Board and its individual members, appellees herein, hereby consent to the filing of

the foregoing answer to the motion filed December 20, 1943, by the National Mediation Board and its individual members.

Robert L. Pierce, Special Assistant to the Attorney General, Department of Justice, Washington, D. C., Counsel for the National Mediation Board and its Members.

I hereby certify that I personally served a copy of the foregoing motion upon each of the following counsel this 2nd day of February 1944.

Robert L. Pierce, Esquire, Special Assistant to the Attorney General, Department of Justice, Washington, D. C.;

R. Aubrey Bogley, Esquire, McKenney, Flannery & Craighill, 901 Hibbs Building, Washington, D. C.;

Alfred L. Bennett, Esquire, 1010 Vermont Avenue, Washington, D. C.

Rufus G. Poole, Attorney for Appellants, 815 15th Street, N. W., Washington, D. C.

[fol. 97] [Stamp:] United States Court of Appeals for the District of Columbia, Filed Jan. 10, 1944. Joseph W. Stewart, Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, OCTOBER TERM, 1943

No. 8571

ORDER OF RAILWAY CONDUCTORS, et al., Appellants

vs.

NATIONAL MEDIATION BOARD, et al., Appellees

Motion to Dismiss Appeal as to the Pennsylvania Railroad Company for Lack of Jurisdiction

Now comes the Pennsylvania Railroad Company, one of the appellees herein, and moves this Court to dismiss the appeal as against it on the ground that neither the District Court of the United States for the District of Columbia nor this Court on Appeal has jurisdiction over the subject matter involved in this case.

The present proceeding is a suit in equity for declaratory and injunctive relief brought by the appellants, Order of Railway Conductors, against the appellees, Pennsylvania Railroad Company, Brotherhood of Railroad Trainmen, and the National Mediation Board. The relief prayed for includes a declaration that certain provisions in a collectively bargained labor agreement entered into by the Pennsylvania Railroad Company and the Brotherhood of Railroad Trainmen were illegal and void, a declaration that the Order of Railway Conductors was the accredited representative of the craft of road conductors on the Pennsylvania Railroad, an order against the Pennsylvania Railroad Company for [fol. 98] bidding negotiations with the Brotherhood of Railroad Trainmen in regard to working conditions of road conductors, an order requiring the Pennsylvania Railroad Company to negotiate with the Order of Railway Conductors in regard to the working conditions of road conductors, an injunction against the Pennsylvania Railroad Company forbidding it to directly or indirectly coerce, influence or interfere with the craft of road conductors in their choice of a representative under the Railway Labor Act, and finally, an order vacating and setting aside a certification issued by the National Mediation Board to the effect that the Brotherhood of Railroad Trainmen is the duly designated and authorized representative of road conductors, and an order forbidding the Board to commence any proceedings for the ascertainment of the bargaining representative of road conductors until the Board shall have found that the Pennsylvania Railroad Company has ceased to interfere with, influence or coerce road conductors in their choice of a bargaining representative.

The case against the appellee, Pennsylvania Railroad Company, constitutes a dispute with respect to whether the appellants, Order of Railway Conductors, or the appellee, Brotherhood of Railroad Trainmen, possesses exclusive jurisdiction to negotiate with respect to the matters contained in the collectively bargained labor agreement, referred to above, between the Company and the Brotherhood of Railroad Trainmen. In the case of *General Committee of Adjustment of the Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R. Co., et al.*, 64 S. Ct. 146, and the case of *General Committee of Adjustment of the Brotherhood of Locomotive Engineers v. Southern Pacific Com-*

pany et al., and General Grievance Committee of the Brotherhood of Locomotive Firemen and Enginemen v. General [fol. 99] Committee of Adjustment of the Brotherhood of Locomotive Engineers, et al., 64 S. Ct. 142, decided November 22, 1943, the Supreme Court of the United States held that such jurisdictional disputes are not justiciable and are consequently not within the jurisdiction of the Federal courts.

The only remaining portion of the case against the appellee, Pennsylvania Railroad Company, is that involving charges to the effect that that Company interfered with, influenced and coerced road conductors in their choice of a representative under the Railway Labor Act. As appears from the record, these identical charges were submitted to the National Mediation Board by the appellants, Order of Railway Conductors, (see Exhibit "G" to the Complaint, pp. 23-33 of Appendix to the Brief of appellants in this Court). The National Mediation Board refused to take any action with respect to those charges for the reasons set forth in Exhibit "H" to the Complaint (pp. 33-40 of Appendix to the Brief of appellants in this Court) and for the reasons set forth in the Brief on behalf of the National Mediation Board before this Court at pp. 13 to 16 inclusive thereof. The National Mediation Board having considered and dismissed the charges made by the appellants, Order of Railway Conductors, against the appellee, Pennsylvania Railroad Company, neither the District Court of the United States for the District of Columbia nor this Court on Appeal has any jurisdiction to review the said determination of the National Mediation Board in the light of the holding of the United States Supreme Court in the case of *Switchmen's Union of North America, et al., v. National Mediation Board, et al.*, 64 S. Ct. 98, decided November 22, 1943.

The appellee, Pennsylvania Railroad Company, urges as a further ground for its motion herein, the fact that the case against the appellee, Pennsylvania Railroad Company, has become moot. The appellee, National Mediation Board, [fol. 100] has, under date of December 20, 1943, filed with this Court a motion to dismiss the appeal with respect to it, and the appellants, Order of Railway Conductors, in their answer filed January 3, 1944, to a similar motion filed by the appellee, Brotherhood of Railroad Trainmen, declared that

it is "not opposing the pending motion of appellees, National Mediation Board, and its members, to dismiss the appeal as against those appellees." Consequently, relief is no longer sought by the appellants against the Board and the certification by the Board of the appellee, Brotherhood of Railroad Trainmen, as the representative of road conductors on the Pennsylvania Railroad is accepted. Such being the case, the Court could no longer grant any of the relief requested by the appellants, Order of Railway Conductors, against the appellee, Pennsylvania Railroad Company. The provisions in the agreement between the Pennsylvania Railroad Company and the Brotherhood of Railroad Trainmen could not be declared illegal and void since the latter organization now represents all of the employees involved, nor could the appellants, Order of Railway Conductors, be declared the designated representative of road conductors contrary to the certification of the National Mediation Board. Furthermore, the Court could not enjoin the appellee, Pennsylvania Railroad Company, from negotiating with the appellee, Brotherhood of Railroad Trainmen, with respect to the working conditions of road conductors, and could not order and direct the appellee, Pennsylvania Railroad Company, to negotiate with the appellants, Order of Railway Conductors, with respect to the working conditions of road conductors, since any such order would be contrary to the certification of the Mediation Board now apparently accepted by the appellants, Order of Railway Conductors. Furthermore, even though the Court were to uphold the charges of appellants, Order of Railway Conductors, that [fol. 101] the appellee, Pennsylvania Railroad Company, engaged in activities constituting interference, influence and coercion of road conductors in their choice of a representative, the requested injunctive relief with respect thereto could not now be granted at the suit of appellants, Order of Railway Conductors, because the said road conductors are now represented, for purposes of collective bargaining, by the appellee, Brotherhood of Railroad Trainmen.

No motion for rehearing in the cases cited herein has been filed in the Supreme Court of the United States and, under the rules of that Court, the time for the filing of such a motion has now expired and the decisions therein have become final.

Wherefore, it is respectfully moved that the appeal in this case be dismissed with respect to the appellee, Pennsylvania Railroad Company, at appellants' costs.

(Signed) John Dickinson, Guy W. Knight, David L. Wilson, 1740 Broad St. Station Bldg., Philadelphia, Pa.; R. Aubrey Bogley, Hibbs Bldg., Washington, D. C., Counsel for Appellee, The Pennsylvania Railroad Company.

[fol. 102] McKenney, Flannery & Craighill, Hibbs Building, Washington, D. C., Of Counsel.

Proof of Service

I hereby certify that I served a copy of the above motion upon each of the following counsel this 10th day of January, 1944, by mailing them a copy thereof:

Rufus G. Poole, Esquire,
William A. Clineburg, Esquire,
815 15th Street, N. W.,
Washington, D. C.

V. C. Shuttleworth, Esquire,
1113 Merchants Bank Building,
Cedar Rapids, Iowa.

Alfred L. Bennett, Esquire,
Denrike Building, 1010 Vermont Ave.,
Washington, D. C.

Bernard M. Savage, Esquire,
521 Title Building,
Baltimore, Maryland.

Robert L. Pierce, Esquire,
Special Assistant to the Attorney General,
Department of Justice,
Washington, D. C.

(Signed) R. Aubrey Bogley, Attorney for Appellee,
The Pennsylvania Railroad Company, Hibbs Building,
Washington, D. C.

[fol. 103] [Stamp:] United States Court of Appeals for the District of Columbia. Filed Jan. 13, 1944. Joseph W. Stewart, Clerk.

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 8571

ORDER OF RAILWAY CONDUCTORS OF AMERICA, ET AL., Appellants,

v.

NATIONAL MEDIATION BOARD, ET AL., Appellees

ANSWER TO MOTION TO DISMISS APPEAL AS TO THE PENNSYLVANIA RAILROAD COMPANY

Now come the appellants in answer to motion of appellee Pennsylvania Railroad Company to dismiss this appeal for lack of jurisdiction, and state that this motion should be denied for reasons set forth below.

The motion requests dismissal on the grounds that the court has no jurisdiction over the subject matter involved in this case.

In support of this contention, the Penn RR purports to analyze those portions of the complaint and prayer for relief which relate to it. This analysis is misleading.

The complaint contains three counts.

Counts I and II allege *inter alia* that the appellee Penn RR violated the provisions of Section 2, Second, Third and Fourth, of the Railway Labor Act by committing acts in pursuance of an unlawful plan which influenced, interfered with and coerced the road conductors in their choice of a bargaining representative and which interfered with the organizing activities of the appellant Order of Railway [fol. 104] Conductors of America, and that appellee Brotherhood of Railway Trainmen conspired and cooperated with the Penn RR in the commission of the aforesaid acts. (See paras. 24-34, incl., Appellants' Appendix 14-17.)

Count III was added to the original bill by way of amendment at the time the National Mediation Board and its members were made party defendants. It charges the National Mediation Board with violating the Railway Labor Act in refusing and failing to investigate certain al-

leged acts of influence, interference and coercion by Appellee Penn RR among its road conductor employees, and in failing and refusing to determine whether a free election could be held at that time to designate a bargaining representative for such employees.

Appellee Penn RR contends on page 3 of its motion "that the Board considered and dismissed the charges made by the appellants," and argues that as a consequence of such consideration that neither this court nor the District Court has jurisdiction to consider these charges apparently for any purpose and cites *Switchmen's Union of North America, et al. v. National Mediation Board*, 64 S. Ct. 95, as authority for this conclusion.

While we believe the point to be wholly irrelevant, it is a fact that the charges of carrier interference were never considered by the Board, as is shown by the pleadings upon which the questions now before this Court must be decided. Paragraph 40 of the amended complaint states

"that the Board rules that it had 'no jurisdiction' or 'power' to consider the charges of the ORC under authority granted it by the Railway Labor Act; that the provisions of Section 2, Ninth, which require the Board 'to insure the choice of representatives by the [fol. 401] employees without interference, influence, and coercion by the carrier,' limited the power of the Board with respect to carrier interference to that occurring at the time of taking a secret ballot and in a prescribed geographical area (Appellants' Appendix, p. 18).

See also Exhibit H of Appellants' Appendix, page 33, paragraph commencing at bottom of page 38 and ending on page 39, which shows that the Board declined to consider the charges of carrier interference because it thought it lacked jurisdiction.

The Penn RR in answering paragraph 40 of the complaint, stated that it was without knowledge or information sufficient to form a belief as to the truth of the allegations (Appellants' Appendix, p. 57).

Further, the amended answer of the National Mediation Board stated

"that the Board, therefore, as a matter of law, had no jurisdiction to consider the validity of these charges

on the merits * * * that in view of the fact that the Board has not passed upon and is not authorized to pass upon the validity of these charges on the merits, these defendants will stand neutral before this court with respect to such issues" (Appellants' Appendix 74).

But even assuming that the Board did consider these charges of carrier interference, such consideration as it gave them was in connection with the request of the ORC that the representation election be postponed. This Court is not being asked here to consider the charges of interference against the Penn RR for the purpose of reviewing the Board, but, as is shown by the pleadings, for the purpose of determining whether such charges, if proved, constitute a violation of the provisions of Section 2, Third and Fourth, of the Railway Labor Act for which judicial relief may be granted. The decision in the *Switchmen's* suit, *supra*, [vol. 106] cited by appellee for the proposition that the Court has no jurisdiction over the subject matter obviously has no application. That decision did no more than deprive the Court of jurisdiction to review the acts of the Board in connection with the certification of bargaining representatives. The decisions in *Switchmen's Union of North America, et al. v. National Mediation Board, et al.*, *supra*, at page 97, and *General Committee of Adjustment v. M-K-T*, 64 S. Ct. 146, at p. 149, both acknowledge that the prohibitions of Section 2, Third and Fourth, of the Railway Labor Act are capable of judicial enforcement.

Appellee Penn RR also contends that the case is moot as against it and advance the argument that the Court may no longer grant any of the specific relief requested. An examination of all the complaint and prayer for relief will show that this contention is baseless. The relief sought in paragraph (2)(b), (8) and (9) of the prayer may still appropriately be granted (Appellants' Appendix, pp. 20-22). Employee representation under the Railway Labor Act is not a static thing. While the BRT is the certified representative of the craft of conductors on the Penn RR today, the appellants ORC have a right under the Act to challenge this representation at any time and seek another election, and the appellants are entitled to a declaration as to whether the offending conduct of the Penn RR was violative of the Railway Labor Act and to

injunctive relief restraining the Penn RR, if it is found so to be.

Moreover, the conduct of the carrier complained of in paragraphs 24-33, inclusive, constitutes a violation of the provisions of Section 2, Fourth, of the Railway Labor Act which prohibits a carrier from influencing or coercing employees in an effort to induce them to join or remain or not to join or remain members of any labor organization. This organizational right is unrelated to the right of union representation and the Courts have jurisdiction to enforce it. See *Clerks* case, 281 U. S. 548, and *Virginian* case, 300 U. S. 515.

This motion calls for a final disposition of the case on grounds which have never been analyzed by the parties in written briefs or presented by oral argument. Appellants have a motion pending before this Court asking leave to file a supplemental brief for the purpose of considering the decisions in the *Switchmen's Union* and *M-K-T* cases and their application to the facts in the subject case. Appellants urge this Court to overrule the motions of appellee Penn RR and BRT to dismiss this case for want of jurisdiction and mootness with directions that the questions raised by the motions be presented in supplemental briefs so that the Court may have the benefit of a full and reasoned argument on the questions involved in the pending motions.

(S.) Rufus G. Poole, William A. Clineburg, 815
15th Street, N. W., Washington, D. C.; V. C.
Shuttleworth, Merchants National Bank Bldg.,
Cedar Rapids, Iowa, Attorneys for Appellants.

[fol. 108] I hereby certify that copies of the foregoing Answer to Motion to Dismiss Appeal as to the Pennsylvania Railroad Company in the above-entitled cause were mailed, postage prepaid, this 13th day of January 1944 to the following attorneys for appellees.

R. Aubrey Bogley, Esquire, McKenney, Flannery
& Craighill, 901 Hibbs Building, Washington, D. C.

Alfred L. Bennett, Esquire, 1010 Vermont Avenue,
Washington, D. C.

Bernard M. Savage, Esquire, 521 Title Building,
Baltimore, Maryland.

Robert L. Pierce, Esquire, Special Assistant to the
Attorney General, Department of Justice, Washington,
D. C.

(S.) Rufus G. Poole, Attorney for Appellants, 815
15th Street, N. W., Washington, D. C.

[fol. 109] [Stamp:] United States Court of Appeals for
the District of Columbia. Filed December 29, 1943.
Joseph W. Stewart, Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT
OF COLUMBIA, OCTOBER TERM, 1943

No. 8571.

ORDER OF RAILWAY CONDUCTORS, et al., Appellants,

v.

NATIONAL MEDIATION BOARD, et al., Appellees

MOTION TO DISMISS APPEAL AS TO BROTHERHOOD OF RAILROAD
TRAINMEN FOR LACK OF JURISDICTION

Now comes the Brotherhood of Railroad Trainmen, one
of the appellees herein and moves this Court to dismiss the
appeal as against them on the ground that neither the Dis-
trict Court of the United States for the District of Colum-
bia nor this Court on appeal has jurisdiction over the sub-
ject matter involved in the case.

This suit invokes the equity jurisdiction of this Court
for declaratory and injunctive relief and seeks, inter alia,
to set aside the certification of the National Mediation
Board pursuant to section 2, Ninth of the Railway Labor
Act, 45 U. S. C. section 152, that the appellee, Brotherhood
of Railroad Trainmen, is entitled to represent the class or
craft of road conductors and asking for injunctive relief
against the Board and its members from the holding of
further elections. The Mediation Board, under date of De-
cember 20, 1943, filed a motion to dismiss the appeal as to
the Board and its members. The case of Switchmen's
Union of North America, et al. v. National Mediation
Board, et al. 64 S. Ct. 98, decided by the Supreme Court of

the United States on November 22, 1943, clearly denied jurisdiction to the courts in proceedings had before the National Mediation Board.

The appellant's bill of complaint, insofar as it involves [fol. 110] this appellee, further asks that certain paragraphs of an alleged agreement made between the appellees, Pennsylvania Railroad and Brotherhood of Railroad Trainmen, be declared null and void as infringing on the appellants' jurisdiction. The Supreme Court of the United States, subsequent to this appeal, in its decision dated November 22, 1943, in the cases of General Committee of Adjustment of Brotherhood of Locomotive Engineers for Missouri-Kansas-Texas R. R. v. Missouri-Kansas-Texas R. Co. et al., 64 S. Ct. 146, and General Committee of Adjustment of Brotherhood of Locomotive Engineers for Pacific Lines of Southern Pac. Co. v. Southern Pac. Co., et al. and General Grievance Committee of Brotherhood of Locomotive Firemen and Enginemen v. General Committee of Adjustment of Brotherhood of Locomotive Engineers for Pacific Lines of Southern Pac. Co., et al., 64 S. Ct. 112, stated that neither the District Court nor this Court had any jurisdiction in controversies of this nature and that the matter was not justiciable.

No motion for rehearing in the Supreme Court cases referred to has been filed and the time for filing these motions having expired, said decisions are now final.

Wherefore it is respectfully prayed that the appeal be dismissed as against this appellee at appellants' cost.

Bernard M. Savage, Alfred L. Bennett, Attorneys
for appellee, Brotherhood of Railroad Trainmen.

[fol. 111]

PROOF OF SERVICE

I hereby certify that I served a copy of the above motion upon each of the following counsel this 28th day of December, 1943, by mailing them a copy thereof:

Rufus G. Poole, Esquire, 815 15th St., N. W., Washington, D. C.

V. C. Shurtleworth, Esquire, 1113 Merchants Bank Building, Cedar Rapids, Iowa.

R. Aubrey Bogley, Esquire, Hibbs Building, Washington, D. C.

Bernard M. Savage, Attorney for Appellee, Brotherhood of Railroad Trainmen.

[fol. 112]. [Stamp:] United States Court of Appeals for the District of Columbia. Filed January 3, 1944. Joseph W. Stewart, Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 8571

ORDER OF RAILWAY CONDUCTORS OF AMERICA, et al., Appellants,

v.

NATIONAL MEDIATION BOARD, et al., Appellees.

ANSWER TO MOTION TO DISMISS APPEAL AS TO BROTHERHOOD OF RAILROAD TRAINMEN

Now come the appellants in answer to motion of appellees Brotherhood of Railroad Trainmen, to dismiss this appeal for lack of jurisdiction and state that this motion should be denied for reasons hereinafter set forth.

The motion requests dismissal with respect to appellees BRT on the grounds that the court has no "jurisdiction over the subject matter involved in the case." As authority for this contention, the motion refers the court to the recently-decided Supreme Court cases of *Switchmen's Union of North America, et al., v. National Mediation Board, et al.*, 64 S. Ct. 95; *General Committee of Adjustment of Brotherhood of Locomotive Engineers for M-K-T R. R. v. M-K-T R. Co., et al.*, 64 S. Ct. 146; and *General Committee of Adjustment of Brotherhood of Locomotive Engineers for Pacific Lines of Southern Pac. Co., v. Southern Pac. Co., et al.*, 64 S. Ct. 142.

Appellants contend that an examination of all the allegations contained in the bill of complaint and the cases cited [fol. 113] by these appellees, does not support the proposition that the courts do not have jurisdiction over any part of the subject matter of the suit which relates to these appellees.

The complaint contains three counts.

Counts I and II allege *inter alia* that the appellee Pennsylvania Railroad Company violated the provisions of Section 2, Second, Third and Fourth, of the Railway Labor Act by committing acts in pursuance of an unlawful plan which

influenced, interfered with and coerced the road conductors in their choice of a bargaining representative and which interfered with the organizing activities of the appellant Order of Railway Conductors of America, and that appellees BRT conspired and cooperated with the Pennsylvania in the commission of the aforesaid acts (see paras. 24-34, inclusive, Appellants' Appendix 14-17).

Count III was added to the original bill by way of amendment at the time the National Mediation Board and its members were made party defendants. It charges the National Mediation Board with violating the Railway Labor Act in refusing and failing to investigate certain alleged acts of influence, interference and coercion by appellee Pennsylvania among its road conductor employees, and in failing and refusing to determine whether a free election could be held at that time to designate a bargaining representative for such employees. The court was requested to set aside an election and certification under which the representative rights for the craft of road conductors on the Pennsylvania were transferred from the appellants ORC to the appellees BRT (Appellants' Appendix 17-20).

The *Switchmen's* case, *supra*, held that the courts do not have jurisdiction to review the acts of the Mediation Board in connection with the certification of a bargaining representative (except perhaps in the situation presented in the *Virginian Ry.* case. See last paragraph of majority decision in *Switchmen's* decision.) Because of this decision, appellants are not opposing the pending motion of appellees National Mediation Board and its members to dismiss the appeal as against those appellees.

There is nothing, however, in the *Switchmen's* decision nor in the other decisions cited which suggests that the courts do not have jurisdiction over the subject matter of these allegations of Counts I and II which charge the Pennsylvania with influencing, interfering and coercing the craft of road conductors in their choice of a bargaining representative and in interfering with the organizational activities of the ORC. In fact, there is much in the opinions of these cases which suggests that the contrary is true.

While no specific relief against the acts of the BRT is requested in the complaint, it is submitted that under Rules 19 and 20 of the Federal Rules of Civil Procedure the BRT

as a result of the cases cited. In this connection, the court is referred to allegations 25-34, inclusive, Appellants' Appendix 14-16.

This case is before the court on appeal for a determination of the question of whether the several allegations of the complaint set forth any claim upon which relief can be granted. See Appellants' Appendix 89. The motion of appellees BRT seeks a premature determination of this issue as against them, without giving the court the benefit of all briefs and oral argument.

[fol. 115] Wherefore, it is respectfully prayed that this motion for dismissal be denied.

Rufus G. Poole, William A. Clineburg, 815 15th Street, N. W., Washington, D. C.; V. C. Shuttleworth, Merchants National Bank Bldg., Cedar Rapids, Iowa, Attorneys for Appellants.

I hereby certify that copies of the foregoing Answer to Motion to Dismiss Appeal as to Brotherhood of Railroad Trainmen in the above-entitled cause were mailed, postage prepaid, this 3rd day of January, 1944, to the following attorneys for appellees.

R. Aubrey Bogley, Esquire,
McKenney, Flannery & Craighill
901 Hibbs Building
Washington, D. C.

Alfred L. Bennett, Esquire
1010 Vermont Avenue
Washington, D. C.

Bernard M. Savage, Esquire
521 Title Building
Baltimore, Maryland

Robert L. Pierce, Esquire
Special Assistant to the Attorney General
Department of Justice
Washington, D. C.

Rufus G. Poole, Attorney for Appellants, 815 15th Street, N. W., Washington, D. C.

[fol. 116] [Stamp:] United States Court of Appeals for the District of Columbia. Filed Jan. 3, 1944. Joseph W. Stewart, Clerk.

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 8571

ORDER OF RAILWAY CONDUCTORS OF AMERICA, et al., Appellants
vs.

NATIONAL MEDIATION BOARD, et al., Appellees

Motion for Leave to File Supplemental Brief

Now come appellants herein and move this court for leave to file a supplemental brief in this case on or before January 22, 1944; and for leave for the appellees, or any of them, should they so elect, to file a supplemental brief in reply thereto at any time within twenty days after the filing of a supplemental brief by appellants.

The ground for this motion is that the Supreme Court issued decisions on November 22, 1943, subsequent to the taking of this appeal and the filing of briefs herein, in *Switchmen's Union of North America v. National Mediation Board*, 64 S. Ct. 25, and *General Committee of Adjustment of the Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas Railroad Company, et al.*, 64 S. Ct. 146, construing vital provisions of the Railway Labor Act, the statute under which this suit is being prosecuted, which should be considered by this court in deciding the issues of this case.

This motion is not filed in opposition to the motion of the National Mediation Board and its individual members Appellees herein, to dismiss this appeal as against these particular appellees, nor for the purpose of delaying the action of this court on that motion.

Rufus G. Poole, William A. Clineburg, 815 15th Street, N. W., Washington, D. C. (Signed) V. C. Shuttlesworth, Merchants National Bank Building, Cedar Rapids, Iowa, Attorneys for Appellants.

Consented to by: R. Aubrey Bogley, Attorney for Pennsylvania Railroad and Baltimore & Eastern Railroad Company. (Signed) Alfred L. Bennett, Bernard M. Savage, Attorneys for Brotherhood of Railroad Trainmen.

[fol. 118] I hereby certify that copies of the foregoing Motion for Leave to File Supplemental Brief in the above-entitled cause were mailed, postage prepaid, this 3rd day of January, 1944, to the following attorneys for appellees:

R. Aubrey Bogley, Esquire,
McKenney, Flannery & Fraighill
901 Hibbs Building
Washington, D. C.

Alfred L. Bennett, Esquire
1010 Vermont Avenue
Washington, D. C.

Bernard M. Savage, Esquire
521 Title Building
Baltimore, Maryland

Robert L. Pierce, Esquire
Special Assistant to the Attorney General
Department of Justice
Washington, D. C.

(S.) Rufus G. Poole, Attorney for Appellants, 815
15th Street, N. W., Washington, D. C.

[fol. 119] [Stamp:] United States Court of Appeals for
the District of Columbia. Filed Jan. 28, 1944. Joseph W.
Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA, JANUARY TERM, 1944

No. 8571

ORDER OF RAILWAY CONDUCTORS, et al., Appellants,

vs.

NATIONAL MEDIATION BOARD, et al., Appellees.

ORDER

It is Ordered by the Court that the motions to dismiss
herein be set down for argument, in February.

Printed briefs of the Brotherhood of Railroad Trainmen
and the Pennsylvania Railroad Company in support of their

respective motions to dismiss to be filed on or before February 7, 1944; printed brief of appellants in opposition thereto to be filed on or before February 14, 1944.

Per Curiam.

Dated January 28, 1944.

[fol. 120] [Stamp:] United States Court of Appeals for the District of Columbia. Filed Feb. 17, 1944. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA

No. 8571

ORDER OF RAILWAY CONDUCTORS OF AMERICA, et al., Appellants

vs.

NATIONAL MEDIATION BOARD, et al., Appellees

STIPULATION

The parties to this case, by their attorneys of record, hereby stipulate that this cause may be heard and determined by two justices of this court.

Dated February 17, 1944:

(Signed) Rufus G. Poole, Attorney for appellants;
Robert L. Pierce, Attorney for Appellee, National
Mediation Board and its members; R. Aubrey Bog-
ley, Attorney for Appellee, Pennsylvania Railroad
Company; Bernard M. Savage, Attorney for Ap-
pellee, Brotherhood of Railroad Trainmen.

[Vol. 121]

Thursday, February 17, 1944.

Before Honorable D. Lawrence Groner, Chief Justice,
and Honorable Justin Miller, Associate Justice:

No. 8571, January Term, 1944

ORDER OF RAILWAY CONDUCTORS OF AMERICA, et al.,
Appellants,

vs.

NATIONAL MEDIATION BOARD, et al., Appellees

Mr. Rufus G. Poole introduced Messrs. William A. Clineburg, a member of the Bar of the Supreme Court of Nebraska, and V. C. Shuttleworth, a member of the Bar of the Supreme Court of Iowa, who were permitted to argue for appellant Order of Railway Conductors of America, pro hac vice by special leave of Court.

Mr. R. Aubrey Bogley introduced Mr. Guy W. Knight, a member of the Bar of the Supreme Court of Pennsylvania, who was permitted to argue for appellee Pennsylvania Railroad, pro hac vice by special leave of Court.

Argument on motions to dismiss commenced by Mr. Robert L. Pierce, for appellee National Mediation Board, continued by Messrs. Guy W. Knight, attorney for appellee Pennsylvania Railroad Company, Bernard M. Savage, attorney for appellee Brotherhood of Railroad Trainmen, William A. Clineburg, attorney for appellant Railway Conductors of America, V. C. Shuttleworth, attorney for appellant Order of Railway Conductors, Guy W. Knight, attorney for appellee Pennsylvania Railroad Company, Bernard M. Savage, attorney for appellee Brotherhood of Railroad Trainmen, and concluded by Mr. William A. Clineburg, attorney for appellant Railway Conductors of America.

[fol. 113] IN UNITED STATES COURT OF APPEALS, DISTRICT
OF COLUMBIA

No. 5571

ORDER OF RAILWAY CONDUCTORS OF AMERICA, ETC., ET AL.,
Appellants,

v.

NATIONAL MEDIATION BOARD, ET AL., Appellees

Appeal from the District Court of the United States for
the District of Columbia

On Motions to Dismiss

Argued February 17, 1944. Decided March 27, 1944

Messrs. William C. Clinchburg, of the Bar of the Supreme Court of Nebraska, and *V. C. Shuttleworth*, of the Bar of the Supreme Court of Iowa, both *pro hac vice*, by special leave of court, with whom *Mr. Rufus G. Poole* was on the brief, for appellants.

Mr. Guy W. Knight, of the Bar of the Supreme Court of Pennsylvania, *pro hac vice*, by special leave of court, with whom *Mr. R. Aubrey Bogien* was on the brief, for appellee Pennsylvania Railroad Company.

Mr. Bernard M. Savage for appellee Brotherhood of Railroad Trainmen. *Mr. Alfred E. Bennett* also entered an appearance for appellee Brotherhood of Railroad Trainmen.

Mr. Robert L. Parce, Special Assistant to the Attorney General, with whom *Mr. Wendell Berg*, Assistant Attorney General, was on the brief, for appellees National Mediation Board and its individual members.

Before Groner, C. J., and Miller, J.

PER CURIAM:

This case is here on appeal and arises out of a jurisdictional dispute between the Order of Railway Conductors and the Brotherhood of Railroad Trainmen.

Since 1927 there had been in effect certain jointly negotiated contracts affecting the relationship of the Pennsylvania Railroad and the two unions. In 1941 the Penn-

the contracts, and negotiations were begun to that end. In the middle of 1942 the negotiations were terminated by the Conductors. Thereafter negotiations between the Railroad and Trainmen resulted in a contract affecting what are called assistant conductors and also the circumstances under which the conductors' "extra board" would be maintained. In the late summer of 1942 conferences were resumed between the Railroad and Conductors. The Railroad [Vol. 114] refused to reopen the questions dealt with in its recently made contract with Trainmen, and Conductors again withdrew. Shortly after this Trainmen invoked the Mediation Board's services to hold an election under "2, Ninth of the Act,"* and to certify that organization as the authorized representative of the road conductors on the Pennsylvania. Conductors protested, claiming that the Railroad, with the purpose of having Trainmen substituted for it as bargaining representative, had been guilty of bad faith and coercion, had encouraged Trainmen and its supporters by giving them undue consideration in the settlement of certain back wage claims of its members, and had spread among the employees, including the road conductors, rumors tending to show that Trainmen was an effective organization, alert to the interests of its members, and that Conductors was not, all with the purpose of inducing the conductors to cast their votes at the election in favor of Trainmen as their bargaining representative. Conductors accordingly requested a postponement of the election until an investigation of the charges had been made by the Board. The Board refused the request for postponement, as well as the request that it investigate the charges and insisted it had no jurisdiction therein, except as to coercion, threatened or practised, while an election is in progress. Conductors then began this suit in the District Court against the Railroad and Trainmen, and while it was pending the election was held and as a result Conductors was displaced as the representative of the craft of road conductors in favor of Trainmen. Conductors then, by amended complaint in which it joined the Board as one of the parties defendant, asked the court below to annul and set aside the election and the certification of the Board and to declare

* Railway Labor Act, as amended June 21, 1934, 45 U. S. C. A., Sec. 151, &c.

that Conductors was the proper representative of the conductors' craft, and to direct the Railroad to bargain with it as to working conditions, etc. Conductors further asked the court to enjoin the Railroad from continuing to coerce the conductors in their choice of a representative against a possible future election. The District Court held that Conductors had no cause of action and dismissed the complaint.

The question now before us arises on the motion of the Board, the Trainmen and the Railroad to dismiss the appeal for lack of jurisdiction. We are of opinion the motion must be granted on the authority of the decision of the Supreme Court in *Switchmen's Union v. National Mediation Board*, 320 U. S. 297. In that case the Court held that under the terms of the Act Federal courts lacked jurisdiction to review in any respect the action of the Board in jurisdictional representative disputes. In the later case of *Brotherhood v. United Transport Service Employees*, decided December 6, 1943, the Court went further and extended the prohibition against judicial review to cases in which the action of the Board was said to be clearly arbitrary.

In the present case Conductors had, prior to this controversy, represented road conductors, and Trainmen had represented yard conductors. When the right of the former to continue to represent road conductors was challenged by Trainmen and it was charged that there was collusion between Trainmen and the Railroad, with the purpose of influencing the electors in casting their ballots, we think the Board should have investigated the charge before calling or holding an election. This seems to us to follow from [Vol. 115] the provisions of the Section of the Act under which the Board is required to function. The Board's justification that jurisdiction to police the election was confined to the event itself, and not the circumstances leading up to it, does not appeal to us. See *Texas & N. O. R. R. Co. v. Brotherhood*, 281 U. S. 548. But after the election had been held and the majority of the votes had been cast and counted for Trainmen and the Board had certified it as the bargaining representative, the decisions of the Supreme Court in the cases we have referred to, as well as in the *Missouri-Kansas* and *Southern Pacific* cases decided the same day, as we understand their purport, foreclose the question we have here and deprive the courts of all right of interference.

The prayer for injunctive relief against the Railroad, growing out of its alleged policy of coercion, which counsel continue to press, even if it be conceded the District Court has jurisdiction to grant the relief asked, would be bootless in the present situation, since it is not alleged that coercion is continuing now, for the dispute which it is claimed gave it birth is over and done with, the controversy conclusively ended, and put to rest by the Board's certification, and there is no reason to suppose there will be another request for an election. For even greater reason no relief, injunctive or otherwise, can be granted against the Board, for having completed its statutory obligation to conduct an election and make a certification, it is *functus officio* so far as the late controversy is concerned.

Appeal dismissed as to all appellees.

[fol. 124a] [Stamp:] United States Court of Appeals for
the District of Columbia. Filed Mar. 27, 1944. Joseph W.
Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA, JANUARY TERM, 1944

No. 8571

ORDER OF RAILWAY CONDUCTORS OF AMERICA, et al.
Appellants,

vs.

NATIONAL MEDIATION BOARD, et al., Appellees

Appeal from the District Court of the United States for the
District of Columbia

JUDGMENT

This cause came on to be heard on the transcript of the
record from the District Court of the United States for the
District of Columbia, and on a motion to dismiss, and was
argued by counsel.

On consideration whereof, It is now here ordered and ad-
judged by this Court that this appeal be, and it is hereby,
dismissed as to all appellees; each party to bear its own
costs.

Per curiam.

Dated March 27, 1944.

A true Copy. Test:

Joseph W. Stewart, Clerk of the United States
Court of Appeals for the District of Columbia.
(Seal.)

[fol. 125] [Stamp:] United States Court of Appeals for the District of Columbia. Filed Apr. 14, 1944. Joseph W. Stewart, Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 8571

ORDER OF RAILWAY CONDUCTORS, et al., Appellants,

NATIONAL MEDIATION BOARD, et al., Appellees

DESIGNATION OF RECORD

The Clerk will please prepare a certified transcript of proceedings in the above-entitled cause for use in connection with the Petition for Writ of Certiorari in the Supreme Court of the United States, and include therein the following:

- (1) Appendix to Appellants' Brief.
- (2) Motion to Dismiss Appeal as to Mediation Board and its Members for Lack of Jurisdiction.
- (3) Motion by Appellants for Leave to File Answer to the Motion to Dismiss Appeal as to the Mediation Board and its Members.
- (4) Motion to Dismiss Appeal as to the Pennsylvania Railroad Company for Lack of Jurisdiction.
- (5) Answer to Motion to Dismiss Appeal as to the Pennsylvania Railroad Company.
- (6) Motion to Dismiss Appeal as to Brotherhood of Railroad Trainmen for Lack of Jurisdiction.
- (7) Answer to Motion to Dismiss Appeal as to Brotherhood of Railroad Trainmen.
- [fol. 126] (8) Appellants' Motion for Leave to File Supplemental Brief.
- (9) Order of the United States Court of Appeals setting down for argument the Motions to Dismiss and requiring the filing of briefs thereon.
- (10) Minute Entry of Argument.
- (11) Opinion of Court on Motion to Dismiss and Order Dismissing Appeal as to all Appellees.

(12) This Designation of Record.

(13) Clerk's Certification.

(S.) Rufus G. Poole, William A. Clineburg, 815 15th Street; N. W., Washington, D. C.; (S.) V. C. Shuttleworth, Merchants National Bank Bldg., Cedar Rapids, Iowa, Attorneys for Appellants.

[fol. 127] I hereby certify that copies of the foregoing Designation of Record in the above-entitled cause were mailed, postage prepaid, this 15th day of April, 1944, to the following attorneys for appellees:

Robert L. Pierce, Esquire, Special Assistant to the Attorney General, Department of Justice, Washington, D. C., Attorney for Appellee National Mediation Board and its Members;

R. Aubrey Bogley, Esquire, 901 Hibbs Building, Washington, D. C., Attorney for Appellee The Pennsylvania Railroad Co.;

Alfred L. Bennett, Esquire, 507 Denrike Building, Washington, D. C., Attorney for Brotherhood of Railroad Trainmen.

(S.) Rufus G. Poole, Attorney for Appellants, 815 15th Street, N. W., Washington, D. C.

[fol. 128] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia, hereby certify that the foregoing pages numbered from 1 to 127, both inclusive, constitute a true copy of the appendices to the briefs of the parties and the proceedings of the said Court of Appeals as designated by counsel for appellants in the case of: Order of Railway Conductors of America, et al., Appellants, vs. National Mediation Board, et al., Appellees, No. 8571, January Term, 1944, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this fourth day of May, A. D. 1944.

Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia. (Seal.)

[fol. 119] IN THE SUPREME COURT OF THE UNITED STATES
 STIPULATION CONCERNING ADDITIONS TO PRINTED RECORD—
 Filed Oct. 18, 1944.

It is hereby stipulated and agreed by and between counsel for the respective parties hereto that there shall be printed and added to the printed record now before the Court the following:

1. Exhibit "B" to the complaint in the District Court of the United States for the District of Columbia, consisting of letter dated August 3, 1942, addressed to W. C. Higginbottom and others signed by J. E. Magill, General Chairman, Pennsylvania Lines East, and C. E. Kalkman, General Chairman, Pennsylvania Lines West, General Committee of Adjustment, Order of Railway Conductors;

2. Exhibit "C" to said complaint, consisting of further letter dated August 3, 1942, addressed to W. C. Higginbottom and others by said J. E. Magill and C. E. Kalkman; and

3. Page 11 of Exhibit "A" to said complaint, said Exhibit being entitled "Schedule of Regulations and Rates of Pay for the Government of Conductors, Trainmen and Switch-Tenders in Road and Yard Service," said page 11 thereof consisting of a schedule of rates of pay for passenger service.

[fol. 120] For more accurate identification, copies of said Exhibit "B" and "C" to said complaint and of Page 11 of said Exhibit "A" to said complaint are hereto attached.

Rufus A. Poole, William A. Clineburg, Attorneys for petitioner; John Dickinson, John B. Prizer, B. Aubrey Bogley, Attorneys for respondent, The Pennsylvania Railroad Company; Bernard M. Savage, Attorneys for respondent, Brotherhood of Railroad Trainmen.

[fol. 121]

EXHIBIT "B"

General Committee of Adjustment

Office of Chairman, 1930 City Centre Building, Philadelphia, Pa.

Order of Railway Conductors

The Pennsylvania Railroad (Former Lines East)

August 3, 1942

Mr. W. C. Higginbottom, General Manager, Eastern Region, P. R. R., 30th Street Station Building, Philadelphia, Pa.

Mr. J. C. White, General Manager, Central Region, P. R. R., Pennsylvania Station, Pittsburgh, Pa.

Mr. H. F. Sites, General Chairman, Brotherhood of Railroad Trainmen, Pennsylvania Lines East, 611 City Centre Building, Philadelphia, Pa.

Mr. H. L. Nauncarrow, General Manager, Western Region, P. R. R., 514 Union Station, Chicago, Illinois.

Mr. J. A. Appleton, General Manager, New York Zone, P. R. R., Pennsylvania Station, New York City, N. Y.

Mr. U. D. Hartman, General Chairman, Brotherhood of Railroad Trainmen, Pennsylvania Lines West, 428 Medical Arts Building, Richmond, Indiana.

GENTLEMEN:

Under date of April 18, 1941, the Management of the Pennsylvania Railroad addressed a notice to the General Chairmen of the Order of Railway Conductors and the General Chairmen of the Brotherhood of Railroad Trainmen of their desire to revise certain Schedule Rules.

Subsequent to receipt of the above referred to notice several joint conferences have been held with the Management of the Pennsylvania Railroad and the Committees of both the Order of Railway Conductors and the Brotherhood of Railroad Trainmen.

Some progress was made regarding some of the rule changes, however, on or about July 24, 1942 the Order of Railway Conductors' Committee was confronted with objections on the part of the Brotherhood of Railroad Trainmen's Committee regarding rules proposed by the Order of

Railway Conductors' Committee, that affected Conductors only.

In view of the position taken by the Brotherhood of Railroad Trainmen's Committee regarding Conductors' rules, the undersigned desire to withdraw from the present joint negotiations with the Brotherhood of Railroad Trainmen's Committee with respect to rule changes, and submit the following notice:

This is to advise that the employees of the Pennsylvania Railroad System engaged as Passenger and Freight Conductors, regular and extra, represented and legislated for by the Order of Railway Conductors of America have approved the presentation of request for a separation of [fol. 122] Schedule and/or Agreements from the present so called joint Schedule and/or joint Agreements.

According to the terms of our present Schedule and/or Agreements, and in conformity with the provisions of the Railway Labor Act, kindly accept this as the required official notice of our desire to separate the present joint Schedule and Agreements.

Please acknowledge receipt.

Very truly yours, (Signed) J. E. Magill, General Chairman, Penna. Lines East; C. E. Kalkman, General Chairman, Penna. Lines West.

[fol. 123]

EXHIBIT "C"

General Committee of Adjustment

Order of Railway Conductors

The Pennsylvania Railroad

(Former Lines East)

Office of Chairman, 1039 City Centre Building, Philadelphia, Pa.

August 3, 1942.

Mr. W. C. Higginbottom, General Manager, Eastern Region, P. R. R., 30th Street Station Building, Philadelphia, Pa.

Mr. J. C. White, General Manager, Central Region, P. R. R., Pennsylvania Station, Pittsburgh, Pa.

Mr. H. L. Nancarrow, General Manager, Western Region,
P. R. R., 514 Union Station, Chicago, Ill.
Mr. J. A. Appleton, General Manager, New York Zone,
P. R. R., Pennsylvania Station, New York City, N. Y.

GENTLEMEN:

In order that you may have a clear understanding of our position in connection with the separation of the joint Schedule (notice of which was served this morning) and what we contend are some of the contractual rights of the Order of Railway Conductors which is the duly recognized Railway Labor Organization that represents and legislates for the Passenger and Road Freight Conductors, regular and extra, on the Pennsylvania Railroad we submit the following:

We know that certain infringements upon Conductors' service rights have taken place on your Railroad especially in passenger service. It must be understood that no work belonging to the class of employes we represent can be legislated for by anyone other than the Order of Railway Conductors.

It must also be understood that no one other than the Order of Railway Conductors' Committee has the right to legislate for the establishment of and the regulation of Conductors' positions, regular and extra.

With respect to carrying on negotiations in connection with your notice of April 18, 1941, on the basis of a separate Schedule, if agreeable we will submit to you for your consideration such rule changes as we desire and offer counter proposals to the rule changes mentioned in your notice of April 18, 1941.

Very truly yours, (Signed) C. E. Kalkman, General Chairman, Penna. Lines West.

(Signed) J. E. Magill, General Chairman, Penna. Lines

APPENDIX

Page 14 of contract between Penn. R.R., BRT and ORC.
effective April 1, 1927, (ORC Exhibit "A").

THE PENNSYLVANIA RAILROAD

EXCLUDING

OHIO RIVER & WESTERN RAILWAY
WAYNESBURG AND WASHINGTON RAILROAD

SCHEDULE OF REGULATIONS AND RATES OF PAY

FOR THE

GOVERNMENT OF CONDUCTORS, TRAINMEN AND SWITCH-
TENDERS IN ROAD AND YARD SERVICE

PASSENGER SERVICE

P. A. C. Rates for passenger service shall be as follows: Basic Rates

CLASS	Rate Per Mile	Rate Per Day	Rate Per Month	Regular and Overtime Hourly Rate
Conductors				
Conductors handling express	4 80	\$7 20	\$216 00	8 90
Conductors handling Government mail	5 03	7 54	216 00	9 425
Conductors handling Government mail and express	(b) 5 03	(b) 7 54	(b) 216 00	(b) 9 425
Assistant Conductors or Ticket Collectors	(b) 5 25	(b) 7 88	(b) 216 00	(b) 9 85
Assistant Conductors or Ticket Collectors handling Government mail and express	(a) 3 94	(a) 5 91	(a) 177 30	(a) 7 4
Assistant Conductors or Ticket Collectors handling Government mail and express	(b) 4 17	(b) 6 25	(b) 177 30	(b) 7 825
Baggagemen handling express, dynamo and Government mail	(b) 4 39	(b) 6 59	(b) 177 30	(b) 8 25
Baggagemen handling dynamo and express	(a) 3 43	(a) 5 90	(a) 177 00	(a) 7 375
Baggagemen handling dynamo or express and Government mail	(b) 4 16	(b) 6 24	(b) 187 20	(b) 7 8
Baggagemen handling either dynamo or express	(a) 3 93	(a) 5 90	(a) 177 00	(a) 7 375
Baggagemen handling either dynamo or express	(a) 3 71	(a) 5 56	(a) 166 80	(a) 6 95
Baggagemen handling Government mail	(b) 3 93	(b) 5 90	(b) 177 00	(b) 7 375
Brakemen	3 71	5 56	166 80	6 95
Brakemen	(c) 3 48	(a) 5 22	(a) 156 60	(a) 6 525
Brakemen	(c) 3 71	(b) 5 56	(b) 166 80	(b) 6 95
Brakemen	3 48	5 22	156 60	6 525
Brakemen	3 37	5 05	151 50	6 325
Brakemen	(c) 3 59	(c) 5 39	(c) 151 50	(c) 6 75

(a) Applies when amount of United States mail handled between any two points does not exceed in volume the minimum space that can be authorized by the Post Office Department, viz.: 3 feet or its equivalent, 54 sacks or pieces.

(b) Applies when amount of United States mail handled between any two points exceeds in volume the minimum space that can be authorized by the Post Office Department, viz.: 3 feet or its equivalent, 54 sacks or pieces.

***** Loading United States mail into car, storing into car, sorting it enroute, or unloading it at intermediate or terminal points will constitute 'handling' under this rule. The extra allowance for handling United States mail will not apply when 'storage' mail is in charge of the baggageman, provided he is not required to 'handle' it.

(c) The extra allowances for handling dynamo, express and/or United States mail by train baggagemen will apply to other trainmen who may be assigned regularly or temporarily to that work.

[fol. 125] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1944

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 48,653. U. S. Court of Appeals, District of Columbia. Term No. 200. Order of Railway Conductors of America, H. W. Fraser, as President of the Order of Railway Conductors of America, etc., et al. Petitioners, vs. The Pennsylvania Railroad Company and Brotherhood of Railroad Trainmen. Petition for a writ of certiorari and exhibit thereto. Filed June 26, 1944. Term No. 200 O. T. 1944.

(4571)

FILE COPY

Office - Supreme Court, U. S.

JUN 26 1944

CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 200

ORDER OF RAILWAY CONDUCTORS OF AMERICA; H. W. FRASER
AS PRESIDENT OF THE ORDER OF RAILWAY CONDUCTORS OF
AMERICA, ETC., ET AL., *Petitioners*,

v.

THE PENNSYLVANIA RAILROAD COMPANY AND BROTHERHOOD
OF RAILROAD TRAINMEN, *Respondents*.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA AND BRIEF IN SUP-
PORT THEREOF.**

RUFUS G. POOLE,
WILLIAM A. CLINEBURG,
815-15th Street, N. W.,
Washington, D. C.,

V. C. SHUTTLEWORTH,
1113 Merchants Bank Bldg.,
Cedar Rapids, Iowa,
Attorneys for the Petitioners.

Of Counsel:

VESEY, WHEELER, POOLE & PRINCE,
815-15th Street, N. W.,
Washington 5, D. C.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1944.

No.

ORDER OF RAILWAY CONDUCTORS OF AMERICA; H. W. FRASER
AS PRESIDENT OF THE ORDER OF RAILWAY CONDUCTORS OF
AMERICA, ETC., ET AL., *Petitioners*,

v.

THE PENNSYLVANIA RAILROAD COMPANY AND BROTHERHOOD
OF RAILROAD TRAINMEN, *Respondents*.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA.**

*To the Honorable, the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

The above-named petitioners respectfully pray that a writ of certiorari issue, to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above-entitled cause on March 27, 1944, dismissing the petitioners' appeal as to the Pennsylvania Railroad Company and the Brotherhood of Railroad Trainmen. No review is sought of the Court of Appeals' judgment in so far as it dismissed the petitioners' appeal as to the National Mediation Board and its members.

OPINION BELOW

The *per curiam* opinion of the Court of Appeals, reported in 141 F. (2d) 366, appears in the printed record at pages 113-115.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C., Sec. 347(a)).

STATUTE INVOLVED

The pertinent provisions of the Railway Labor Act, as amended by the Act of June 21, 1934 (45 U. S. C., Sec. 151 et seq.), are set forth in the Appendix to this petition.

STATEMENT OF THE MATTER

In 1941 the Pennsylvania Railroad Company (hereinafter called Pennsylvania) served notice upon the Order of Railway Conductors of America (hereinafter called ORC), as the bargaining representative of the craft of road conductors employed by Pennsylvania, and upon the Brotherhood of Railway Trainmen (hereinafter called BRT), as the bargaining representative of the craft of road brakemen employed by Pennsylvania, of its desire to revise the contract then governing the rates of pay and working conditions of each of these crafts. That contract had been negotiated with Pennsylvania in 1927 by ORC and BRT jointly, and they agreed to negotiate jointly its revision. Conferences between the two unions and the carrier began in May, 1941, and continued until August, 1942, when ORC withdrew in protest against alleged attempts by Pennsylvania and BRT to deprive it of its rights as bargaining agent for the road conductors. Thereafter Pennsylvania negotiated with BRT alone and on August 17, 1942, they executed a contract to become effective one month later. (R. 5-7.)

[illegible]

formed by "additional" conductors); and BRT's achievement in securing Pennsylvania's agreement to pay in full some 75 per cent of all BRT claims pending before the Railroad Adjustment Board. In the closing paragraph of the letter, ORC offered to present the Board with proof of its charges. (R. 23-33.)

On November 9, 1942, in response to ORC's letter of protest, the Board ruled that it had no alternative under the Railway Labor Act but to proceed with the conduct of a representation election. (R. 33-40.) The basis for its ruling is significant (R. 38-39):

"The contentions which you make regarding the carrier's influence arise out of circumstances ante-dating the Board's investigation of this case which was begun on November 2, 1942, circumstances in respect of which the Mediation Board possesses no jurisdiction. Our power in such matters is to insure that during the time of taking a secret ballot or in exercising other methods of ascertaining the choice of representatives, the employee shall be free from interference, influence or coercion by the carrier. This, the Board can and will do within a prescribed area if, and when, an election is being held.

"In this comment on carrier influence, it seems unnecessary to do more than point out to you that the Railway Labor Act prescribes an exclusive procedure for the protection of employees in the choice of representatives. The provisions of Section 3 as quoted above may be made effective through the application of Section 10 of the Act."

On November 27, 1942, ORC and four of its officers (collectively referred to hereinafter as petitioners) filed a complaint in the United States District Court for the District of Columbia against BRT and Pennsylvania. (R. 1-17.)¹ This complaint contained allegations substantially the same as the charges that had been set forth in ORC's letter of protest. It alleged that Pennsylvania and BRT had con-

¹ The two counts contained in this complaint were retained without change as Counts I and II of the amended complaint.

spired in an unlawful plan of action designed to discredit and weaken ORC and strengthen BRT in their respective standings with the conductors and thereby to interfere with and influence the conductors in their choice of a representative. (R. 14.) It alleged that, in pursuance of this plan, Pennsylvania and BRT invaded and encroached upon ORC's jurisdictional rights as representative of the conductors, by including in their contract of August 17, 1942, provisions creating a new class of "Assistant conductors" to do the work formerly done by "additional" conductors (in respect of whose work ORC had theretofore enjoyed the exclusive right to bargain with (Pennsylvania), and provisions regarding the composition and control of the conductors' extra board (the operation and maintenance of which had for many years been under the bargaining jurisdiction of ORC), and that Pennsylvania caused the contract containing these provisions to be rushed to publication and widely circulated among the conductors. (R. 7-12, 14-15.) It alleged that, pursuant to the plan and purpose aforesaid, Pennsylvania agreed to settle the claims for "assistant conductors" pay which had been filed with the Adjustment Board by BRT in behalf of its brakemen-members, and that Pennsylvania caused this settlement agreement to be widely circulated and publicized among the conductors. (R. 14, 15.) The complaint further alleged that Pennsylvania had engaged in dilatory tactics, had failed and refused to bargain and negotiate with ORC as the representative of the conductors, but had bargained respecting the working conditions of the conductors with BRT, not the conductors' representative, and that Pennsylvania intentionally delayed negotiations with ORC in order that BRT could cause a representation election to be held among the conductors at a time when ORC's reputation as a bargaining agent was impaired. (R. 12-13, 15-16.)

The complaint requested the Court to declare that ORC, as the representative of the craft of road conductors, had the exclusive right to negotiate with Pennsylvania represent-

ing the working conditions of that craft, and to enjoin Pennsylvania from directly or indirectly interfering with and influencing the conductors in their choice of a representative. (R. 21-22.)²

On December 2, 1942, six days after this complaint was filed, the Board ordered a representation election to be held among the conductors. BRT received the majority of the votes cast at the election and on December 27 the Board certified BRT as the duly designated representative of the craft. (R. 19.)

The petitioners thereupon amended their complaint by adding a third count thereto and joining the Board as a party defendant. (R. 17-22.) Count III recited what had occurred in the case after BRT's filing of an invocation with the Board on September 23, 1942, and alleged that the election and certification were invalid and should be set aside for two reasons: *First*, because the Board had failed and refused to perform its duty under the Railway Labor Act to determine whether Pennsylvania had, as charged, engaged in conduct constituting carrier interference and influence with the conductors' choice of a representative, and, *secondly*, because Pennsylvania had in fact engaged in conduct that interfered with and influenced the conductors' choice. (R. 19-20.)

The amended complaint added two paragraphs to the original prayer for relief, requesting (a) that the election and certification be set aside and (b) that the Board be enjoined from holding a further election until such time as it should determine that the conduct charged to Pennsylvania did not constitute carrier interference and influence or, in the alternative, that the conduct charged to Pennsylvania be declared to constitute carrier interference and influence and the Board enjoined from holding a further election until such time as it should determine that such interference and influence had ceased. (R. 20-21.)

² The prayer for relief in this complaint was incorporated without change in the prayer for relief in the amended complaint as paragraphs (3)-(9) thereof.

In answering this amended complaint, the Board protested that the election and certification could not be set aside on the ground that it had refused to investigate or consider the charges set forth in ORC's letter of protest, because those charges related to conduct ante-dating the election and it had no power or duty under the Railway Labor Act with respect to acts of carrier interference except those occurring during the actual conduct of an election. The Board contended that inasmuch as the conduct which ORC had charged to Pennsylvania did not occur during the holding of the election, the truth and validity of the charges should be determined by the District Court on a *de novo* trial. (R. 62-63, 73-74.)

In view of the fact that the answer of the Board admitted that it had held the election and issued the certification without investigating or considering ORC's charges, the petitioners in March, 1943, filed a motion for a summary judgment against the Board, requesting that the election and certification be set aside and the Board enjoined from holding a further election until such time as the Board should determine, after investigation and consideration of the conduct charged to Pennsylvania, that such conduct had ceased or would not interfere with the conductors in their choice of a representative. (R. 65-67.)

The motion was argued in May, and on June 11, 1943, the District Court,

"* * * being of the opinion that there [was] no genuine issue as to any material fact with respect to the relief requested under the motion for summary judgment, but being of the further opinion that the facts admitted as true and all other facts alleged in the complaint and amended complaint of the plaintiffs, [did] not establish that the plaintiffs [had] a cause of action: * * *

entered a judgment and order dismissing not only the motion for summary judgment, but the complaint and the amended complaint as well. (R. 89.)

Before the appeal from this judgment and order came on for argument, this Court entered decisions in three cases involving the Railway Labor Act, *Switchmen's Union Board*, 320 U. S. 297; *General Committee v. M.-K.-T. R. Co.*, 320 U. S. 323; *General Committee v. Sou. Pac. Co.*, 320 U. S. 338. In reliance upon those decisions, motions were filed to dismiss the appeal as to each of the respondents on the ground that neither the District Court nor the Court of Appeals had jurisdiction over the subject matter involved. (R. 92, 95-99, 104-105.)

In opposing these motions, the petitioners conceded that under this Court's decisions in the above cases the District Court and the Court of Appeals may have had no jurisdiction to consider the issue raised by the motion for summary judgment—whether the election and certification should be set aside for the reason that the Board had conducted the election and certified the winner without first investigating or considering ORC's charges of carrier interference. *The petitioners contended that the Courts did have jurisdiction, however, to consider the other issue raised by the pleadings—whether the election and certification could be set aside for the reason that prior to the holding of the election Pennsylvania had in fact engaged in conduct that interfered with and influenced the choice exercised by the conductors at the election.* It was urged that the "right" guaranteed to employees by Section 2, Third, of the Act—the "right" to select representatives "without interference, influence or coercion" by the carrier—can be violated by carrier conduct occurring prior to the holding of an election as well as by carrier conduct occurring during the holding of an election; that the Board had held it had no power to enforce this right against acts of carrier interference occurring prior to the holding of an election; that this Court in the *Switchmen's Union* case, *supra*, reaffirmed the principles laid down in *Texas & N. O. R. Co. v. Ry. Clerks*, 281 U. S. 548, *Virginian Ry. v. Federation*, 300 U. S. 515, and acknowledged a power in the federal courts to enforce this right against acts of carrier inter-

ference when the right would otherwise be obliterated; and that the federal courts' power in this regard necessarily is sufficiently broad to include the power to annul a certification if annulment of the certification is essential to the effective enforcement of the right.

On March 27, 1944, the Court of Appeals decided *per curiam* that the appeal should be dismissed as to all parties, holding that while the Board had misinterpreted the Railway Labor Act in ruling that it had no jurisdiction with respect to acts of carrier interference occurring prior to the actual conduct of the election, the courts lacked the power to consider the case or grant the relief requested. The Court of Appeals based its decision on this Court's decisions in the *Switchmen's Union, Southern Pacific*, and *M-K-T* cases, *supra*, construing those cases as holding that under no circumstances may an election or certification be set aside by the federal courts—whether because of arbitrary action by the Board or, as in this case, to enforce the right of employees to choose a representative without interference by the carrier. (R. 113-115.)

The facts of this case, as posed by the pleadings, which warrant the issuance of a writ of certiorari, are:

1. By its conduct prior to the holding of the election, Pennsylvania interfered with and influenced the election at which BRT was selected as the conductors' representative.

2. The Board has maintained that "as a matter of law" it had no power to investigate or consider Pennsylvania's conduct, because such conduct occurred prior to the holding of the election.

3. The Court of Appeals held, on the authority of the *Switchmen's Union* and companion decisions, that the courts are without power to enforce the right of employees to choose a representative without interference by the carrier, where enforcement requires the nullification of an election and certification.

This petition does not solicit the Court to reconsider its recent decisions in *Switchmen's Union v. Board, General*

Committee v. M. K. T. R. Co. and *General Committee v. Sou. Pac.*, *supra*, in so far as those decisions establish that the federal courts have no power to review action taken by the Board pursuant to Section 2, Ninth, of the Railway Labor Act and preliminary to issuing a certification. *The petitioners concede that the Board's ruling in the instant case that it has no power under Section 2, Ninth, to investigate or consider acts of carrier interference which occur prior to the actual conduct of a representation election, is unreviewable.* The petitioners are contending that Section 2, Third, of the Act insures to employees an enforceable right to be free of all acts of carrier interference, irrespective of *when* such acts occur; that if the Board has no power to protect the right from violation by acts of carrier interference occurring prior to the actual conduct of an election, the federal courts necessarily have the power to enforce the right against such prior acts; and that the federal courts' power to enforce the right includes the power to nullify a certification, if nullification is necessary to effectively enforce the right.

QUESTIONS PRESENTED.

1. Do the federal courts have the power to set aside a certification issued by the Board if the carrier, prior to the holding of the election, engaged in conduct which interfered with and influenced the choice exercised by the employees at the election—conduct which the Board said “as a matter of law” it had no jurisdiction to investigate or consider?
2. Does the “right” guaranteed to employees by Section 2, Third, of the Railway Labor Act to select representatives without “interference, influence or coercion” by the carrier, include merely the right to be free of acts of carrier interference occurring *during* the holding of a representation election, or does it include also the right to be free of a carrier's acts which, though they occur *prior* to the election, interfere with the choice exercised by the employees at the election?

REASONS FOR GRANTING THE WRIT.

1. The decision of the Court of Appeals is contrary to this Court's decisions in *Virginian Ry. v. Federation*, 300 U. S. 515, and *Texas & N. O. R. Co. v. Ry. Clerks*, 281 U. S. 548, wherein the right guaranteed to employees by Section 2, Third, of the Railway Labor Act was declared to be judicially enforceable. Further, the decision of the Court of Appeals in the instant case does not give proper effect to the decisions of this Court in *Switchmen's Union v. Board*, 320 U. S. 297; *General Committee v. M.-K.-T. R. Co.*, 320 U. S. 323; *General Committee v. Sou. Pac. Co.*, 320 U. S. 338.

2. The effect of the decision of the Court of Appeals is to destroy the principal right guaranteed employees by the Railway Labor Act—the right to select a bargaining representative without carrier interference, influence and coercion. A determination by this Court as to the existence and enforceability of the right of freedom of choice in the selection of bargaining representatives, is of vital concern to more than one million railway employees.

WHEREFORE, the petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals of the District of Columbia entered in this case March 27, 1944.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. _____

ORDER OF RAILWAY CONDUCTORS OF AMERICA; H. W. FRASER
AS PRESIDENT OF THE ORDER OF RAILWAY CONDUCTORS OF
AMERICA, ETC., ET AL., *Petitioners*,

v.

THE PENNSYLVANIA RAILROAD COMPANY AND BROTHERHOOD
OF RAILROAD TRAINMEN, *Respondents*.

**BRIEF IN SUPPORT OF PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA.**

PRELIMINARY STATEMENT.

We refer to the foregoing petition for a citation of the opinion below, a statement of the grounds of jurisdiction, a citation of the statute involved and a summary statement of the case.

ARGUMENT.

I.

The Decision of the Court of Appeals in the Instant Case Does Not Give Proper Effect to Applicable Decisions of This Court.

In the instant case, ORC protested to the Board that a representation election should not be held among the conductors "at this time" for the reason that Pennsylvania and BRT were guilty of engaging in conduct prejudicial of ORC's reputation as a bargaining agent and such an election would not, therefore, be free of carrier interference and influence. The Board ruled, however, that it had no jurisdiction under the Railway Labor Act to consider ORC's charges—that its power with respect to carrier interference was limited to acts of interference occurring "during the time of taking a secret ballot" and "within a prescribed area," and that ORC's charges related to acts ante-dating the invocation of the Board's services. Without ever investigating or considering ORC's charges of carrier interference, the Board held an election among the conductors and certified the winner, BRT, as the conductors' representative. The Court of Appeals decided that although the Board was derelict in holding an election without first investigating ORC's charges of carrier interference, the petitioners' appeal should be dismissed.

"on the authority of the decision of the Supreme Court in *Switchmen's Union v. National Mediation Board*, 320 U. S. 297."

It was the Court of Appeals' opinion that

"after the election had been held and the majority of the votes had been cast and counted for [BRT] and the Board had certified it as the bargaining representative, the decisions of the Supreme Court in the cases we have referred to, as well as in the *Missouri-Kansas* and *Southern Pacific* cases decided the same day, as we

understand their purport, foreclose the question we have here and deprive the courts of all right of interference."

A. We believe that the Court of Appeals' decision is contrary to this Court's decisions in *Texas & N. O. R. Co. v. Ry. Clerks*, 281 U. S. 548, and *Virginian Ry. v. Federation*, 300 U. S. 515.

Texas & N. O. R. Co. v. Ry. Clerks, *supra*, involved a suit which had been brought to enjoin a carrier from "interfering with, influencing and coercing" its employees in the designation of representatives in violation of Section 2, Third, of the Railway Labor Act of 1926. The District Court issued an injunction (25 F. (2d), 876 (S. D. Tex.)), the Fifth Circuit Court of Appeals held that the injunction was properly granted (33 F. (2d), 13), and this Court affirmed. In the course of his opinion, Mr. Chief Justice Hughes stated (281 U. S., p. 569):

"* * * Freedom of choice in the selection of representatives on each side of the dispute is the essential foundation of the statutory scheme. All the proceedings looking to amicable adjustments and to agreements for arbitration of disputes, the entire policy of the Act, must depend for success on the uncoerced action of each party through its own representatives to the end that agreements satisfactory to both may be reached, and the peace essential to the uninterrupted service of the instrumentalities of interstate commerce may be maintained. There is no impairment of the voluntary character of arrangements for the adjustment of disputes in the imposition of a legal obligation not to interfere with the free choice of those who are to make such adjustments. On the contrary, it is of the essence of a voluntary scheme, if it is to accomplish its purpose, that this liberty should be safeguarded. The definite prohibition which Congress inserted in the Act can not therefore be overridden in the view that Congress intended it to be ignored. As the prohibition was appropriate to the aim of Congress, and is capable of enforcement, the conclusion must be that enforcement was contemplated."

Virginian Ry. Co. v. Federation, supra, involved a suit which had been brought under the Railway Labor Act, as amended in 1934, to (1) compel a carrier to "treat with" the plaintiff, the certified representative of a craft of the carrier's employees, as required by Section 2, Ninth, and (2) to enjoin the carrier from "interfering with, influencing and coercing" its employees in their choice of a representative in violation of Section 2, Third. The District Court entered a decree directing the carrier to "treat with" the plaintiff and restrained the carrier from "interfering with, influencing or coercing" its employees in their choice of a representative (11 F. Supp. 621 (E. D. Va.)), and the Fourth Circuit Court of Appeals sustained the decree (84 F. (2d) 641). On certiorari, this Court stated (300 U. S., pp. 543-544):

"The prohibition against such interference was continued and made more explicit by the amendment of 1934. Petitioner does not challenge that part of the decree which enjoins any interference by it with the free choice of representatives by its employees, and the fostering, in the circumstances of this case, of the company union. That contention is not open to it in view of our decision in the *Railway Clerks Case, supra*, and of the unambiguous language of § 2, Third, and Fourth, of the Act, as amended."

Speaking for a majority of this Court in *Switchmen's Union v. Board*, 320 U. S. 297, Mr. Justice Douglas said, with reference to the *Clerks* and *Virginian Ry.* cases (320 U. S., p. 300):

"If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control. That was the purport of the decisions of this Court in *Texas & New Orleans R. Co. v. Brotherhood of Clerks*, 281 U. S. 548, and *Virginian Ry. Co. v. System Federation*, 300 U. S. 515. In those cases it was apparent that

but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act. The result would have been that the 'right' of collective bargaining was unsupported by any legal sanction. That would have robbed the Act of its vitality and thwarted its purpose."

In his opinion in *General Committee v. M-K-T. R. Co.*, 320 U. S. 323, Mr. Justice Douglas made further reference to the *Clerks'* case, stating (320 U. S., p. 327):

"... But Congress also supported its policy with the imposition of some rules of conduct for breach of which the courts afford a sanction. Thus Congress stated in §2, Third, of the 1926 Act that the choice by employees of their collective bargaining representatives should be free from the carriers' coercion and influence. That 'definite statutory prohibition of conduct which would thwart the declared purpose' of the Act was held by this Court in the *Clerks'* case to be enforceable in an appropriate suit. 281 U. S. 548, 568."

In the *Clerks'* case this Court decided that the right guaranteed to employees by Section 2, Third, of the Railway Labor Act of 1926 is judicially enforceable, and it is evident from this Court's opinion in the *Virginian Ry., Switchmen's Union* and *M-K-T* cases that the 1934 amendments to the Railway Labor Act did not modify the force and effect of that decision. This Court's opinion in the *Clerks'* case does not suggest that the power of the federal courts to enforce this right is limited and no limitation is suggested in this Court's opinions in the *Virginian Ry., Switchmen's Union* and *M-K-T* cases. See *Stark v. Wickard*, 321 U. S. 288, 303. The Court of Appeals' decision in the case at bar is contrary to the accepted meaning of this Court's decision in the *Clerks* and *Virginian Ry.* cases, as the Court of Appeals denied the existence of power in the federal courts to enforce and protect the conductors' right to be free from acts of carrier interference occurring prior to the election.

B. We believe further that the Court of Appeals' decision in the instant case gives improper effect and application to this Court's decisions in *Switchmen's Union v. Board*, 320 U. S. 297; *General Committee v. M.-K.-T. R. Co.*; and *General Committee v. Sou. Pac. Co.*, 320 U. S. 338.

In the case at bar, the Board, ruling that it had no power to protect the right of freedom of choice from carrier interference occurring prior to the holding of an election, ordered and sponsored a representation election among the conductors and certified the winner as the conductors' representative. On the authority of the *Switchmen's Union* and companion decisions *supra*, the Court of Appeals held that notwithstanding the fact that, prior to the holding of the election, Pennsylvania engaged in conduct which interfered with and influenced the choice exercised by the conductors at the election, the courts have no power to set aside the certification. This means, of course, that neither the Board nor the federal courts have the power to enforce the right guaranteed to employees by Section 2, Third, of the Railway Labor Act to choose a representative without interference by the carrier, *whenever such interference is accomplished by the carrier prior to the actual exercise of the choice*. This virtually obliterates the right of employees to a freedom of choice, for it is common knowledge that employer interference almost always occurs prior to employee elections.

We think no such a result is required by this Court's decisions in *the Switchmen's Union*, *Southern Pacific* and *M-K-T* cases. Rather, we think those decisions require the opposite result, as they expressly recognize that the federal courts will enforce a right guaranteed by the Railway Labor Act if the right would otherwise be obliterated.

³ It is no answer to suggest that such acts of interference and influence may be enjoined by federal courts, for the effects of such interference are of a continuing nature and unless the election is postponed or can be set aside upon a showing that it was not free but was influenced, the right is lost.

This Court viewed the *Switchmen's Union, supra*, case as a suit brought to enforce the right guaranteed by Section 2, Fourth, of the Railway Labor Act—the “right” of a “majority of any craft or class of employees” to “determine who shall be the representative of the craft or class,” and ruled that the federal courts have no power to entertain such a suit. The problem posed was whether the broad grant of general jurisdiction embodied in Section 24(8) of the Judicial Code empowers a federal court to review a Board determination affecting the “right” which Congress created when it enacted Section 2, Fourth, of the Railway Labor Act. Recognizing that “it is for Congress to determine how rights which it creates are to be enforced,” this Court regarded the problem as one of Congressional intent and concluded that Congress did not intend that Section 24(8) of the Judicial Code should empower the federal courts to enforce the right in question. As we understand the majority opinion, two steps are involved in the analysis which led this Court to this conclusion:

- (1) Where the absence of jurisdiction of the district courts would mean the sacrifice or obliteration of a right which Congress has created, there is a strong inference Congress intended that Section 24(8) of the Judicial Code should empower district courts to enforce the right.
- (2) It cannot be inferred that Congress intended that Section 24(8) of the Judicial Code should empower district courts to enforce the “right” of a “majority of any craft or class of employees” to “determine who shall be the representative of the craft or class,” however, because Congress provided in Section 2, Ninth, of the Railway Labor Act for the protection of that right by empowering the Board to resolve controversies concerning it.

The evolution and structure of the Railway Labor Act were drawn upon by the majority to confirm the view that Congress contemplated the right would be fully protected and enforced by Section 2, Ninth.

The same analysis led this Court to decide in the *M-K-T* and *Southern Pacific* cases, in which the federal courts had been called upon to define the boundary line between two crafts, that no judicially enforceable rights were involved.

That our understanding of these cases is correct, is borne out by the following excerpt from this Court's opinion in *Stark v. Wickard*, 321 U. S. 288, 306-307:

"* * * Under the unusual circumstances of the historical development of the Railway Labor Act, this Court has recently held that an administrative agency's determination of a controversy between unions of employees as to which is the proper bargaining representative of certain employees is not justiciable in federal courts. *General Committee v. M-K-T. R. Co.*, 320 U. S. 323. Under the same Act it was held on the same date that the determination by the National Mediation Board of the participants in an election for representatives for collective bargaining likewise was not subject to judicial review. *Switchmen's Union v. Mediation Board*, 320 U. S. 297. This result was reached because of this Court's view that jurisdictional disputes between unions were left by Congress to mediation rather than adjudication. 320 U. S. 302 and 337. That is to say, no personal right of employees, enforceable in the courts, was created in the particular instances under consideration. 320 U. S. 337, 64 S. Ct. 152. But where rights of collective bargaining, created by the same Railway Labor Act, contained definite prohibitions of conduct or were mandatory in form, this Court enforced the rights judicially. 320 U. S. 336, 331. Cf. *Texas & N. O. R. Co. v. Brotherhood of Clerks*, 281 U. S. 548; *Virginian Ry. Co. v. System Federation*, 300 U. S. 515.

"It was pointed out in the *Switchmen's* case that:

"If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control." 320 U. S. at 300."

Thus, the *Switchmen's Union* case involved a suit to enforce the right guaranteed by Section 2, Fourth, of the Act, while the instant case involves a suit to enforce the right provided for in Section 2, Third, of the Act, and in the former case this Court did not consider or decide the question whether the federal courts have the power to entertain a suit brought to enforce the right here involved. Indeed, if this Court's reasoning in the *Switchmen's Union* case is applied to the instant case, the conclusion is inescapable that the Courts did have jurisdiction to entertain the instant suit and that the Court of Appeals' decision is in consonant with the *Switchmen's Union* decision. It must be inferred that Congress intended that Section 24(8) of the Judicial Code empowered the courts to entertain the instant suit, because the absence of such power would mean a sacrifice or obliteration of the right which Congress created when it enacted Section 2, Third, of the Railway Labor Act. There would be a sacrifice of this right if the courts were without such power, because the Board has determined that Section 2, Ninth, of the Railway Labor Act does not authorize it to protect the right from acts of carrier interference ante-dating the actual conduct of an election.

The conclusion that the courts have jurisdiction to entertain the instant suit is not incompatible with the proposition that the federal courts have no power to review action taken by the Board preliminary to issuing a certification and pursuant to provisions of Section 2, Ninth (a proposition which derives from the *Switchmen's Union* decision). While the courts may lack the power to set aside the Board's certification on the ground that the Board failed to investigate or consider ORC's charges of carrier interference, the courts are not precluded from setting aside the certification on the ground that prior to the election Pennsylvania in fact interfered with and influenced the choice exercised by the conductors at the election.

II.

The Decision of the Court of Appeals in the Instant Case Negatives the Statutory Guarantee Against Carrier In- terference.

One of the major purposes of the Railway Labor Act is (Section 2 (Clause 3)) "to provide for the complete independence of carriers and of employees in the matter of self-organization." The achievement of this purpose is implemented by Section 2, Third, which provides that

"Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by inference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier."

and by Section 2, Ninth, which provides that

"... the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier."

In the instant case, the Court of Appeals disagreed with the Board's ruling that it has no authority under the Act with respect to acts of carrier interference ante-dating the actual conduct of a representation election, but the Court disclaimed any power to require a modification by the Board of its ruling and the Court further disclaimed any power to consider whether acts of carrier interference had

occurred prior to the election in question. This decision necessarily operates to leave the right-unprotected from acts of carrier interference ante-dating the conduct of an election; it operates to permit a carrier to interfere with its employees' choice of a representative at all times except during the brief period in which the choice is exercised. The accepted meaning of Section 2; Third, is that acts of carrier interference are illegal, irrespective of when they occur. See *Texas & N. O. R. Co. v. Clerks, supra*; *Virginian Ry. v. Federation, supra*.

CONCLUSION.

Without undertaking at this time to present an adequate argument on the merits, we submit that the petition for writ of certiorari should be granted in order that this Court may review the decision of the United States Court of Appeals for the District of Columbia in this case.

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APPENDIX.

EXCERPTS FROM THE RAILWAY LABOR ACT

(Act of May 20, 1926, as amended by Act of June 21, 1934,
45 U. S. C.; Sec. 151, *et seq.*)

Section 2. * * *

Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

* * * * *

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representatives so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who

after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than \$1,000 nor more than \$20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 200.

ORDER OF RAILWAY CONDUCTORS OF AMERICA; H. W. FRASER
AS PRESIDENT OF THE ORDER OF RAILWAY CONDUCTORS
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v.

THE PENNSYLVANIA RAILROAD COMPANY AND BROTHERHOOD
OF RAILROAD TRAINMEN, *Respondents*.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the District of Columbia.

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OCTOBER TERM, 1944.

No. 200.

ORDER OF RAILWAY CONDUCTORS OF AMERICA; H. W. FRASER
AS PRESIDENT OF THE ORDER OF RAILWAY CONDUCTORS
OF AMERICA, ET AL., *Petitioners,*

v.

THE PENNSYLVANIA RAILROAD COMPANY AND BROTHERHOOD
OF RAILROAD TRAINMEN, *Respondents.*

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the District of Columbia.

REPLY BRIEF FOR PETITIONERS.

In opposing the petition for a writ of certiorari, Respondents have advanced several arguments to which Petitioners reply as follows:

ARGUMENT.

I.

The Switchmen's Union Case.

Pennsylvania has endeavored to establish that the case at bar parallels the case of *Switchmen's Union v. Board*, 320 U. S. 297, and that the federal courts are without power to entertain the instant case for the same reason they were

held to have no jurisdiction over the subject matter involved in the *Switchmen's Union* case. (Penna. br. 7-13) BRT has advanced a similar argument. (BRT br. 9-12)

The *Switchmen's Union* case, Pennsylvania points out, involved a suit to enforce the right guaranteed by Section Fourth, of the Act; and this Court held the Federal courts to be without power to enforce the right for the reason "that Congress had delegated to the Board the task of protecting the 'right' of employees embodied in Section 2, Fourth, of the Act; and, since Congressional specification of one method for the protection of a right normally excludes other methods, it is to be assumed that Congress did not contemplate judicial review." (Penna. br. 8) Pennsylvania contends that for the same reason the Federal courts are without power to entertain the instant case—that this is a suit to enforce the right guaranteed by Section 2, Third, of the Act, and Congress confided to the Board the power to enforce that right when it adopted the following provision into the Act as a part of Section 2, Ninth:

"In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier."

It is said that this specification by Congress of one method for protecting the right excludes other methods—that the Board's enforcement power is exclusive.

Petitioners could agree with this argument but for one circumstance, the existence of which Pennsylvania has sought to conceal under a canopy of statements which contradict facts disclosed by the record before this Court. The circumstance referred to is the Board's asserted view that the Railway Labor Act does not vest it with a power to

protect the right guaranteed by Section 2, Third, from acts of carrier interference which occur *prior* to the actual conduct of a representation election, but merely empowers it to protect the right from acts of carrier interference which occur *during* the progress of a representation election. The Board so defined its power in the following ruling issued during the early stages of this controversy:

"The contentions which you make regarding the carrier's influence arise out of circumstances antedating the Board's investigation of this case which was begun on November 2, 1942, circumstances in respect of which the Mediation Board possesses no jurisdiction. Our power in such matters is to insure that during the time of taking a secret ballot or in exercising other methods of ascertaining the choice of representatives, the employees shall be free from interference, influence or coercion by the carrier. This, the Board can and will do within a prescribed area, if, and when, an election is being held." (R. 38-39)

In its amended answer the Board defended and reiterated this view:

"In answer to paragraph 44 of the complaint, these defendants deny that the said election and the certification are illegal, null and void; they deny that the Board, in not determining whether the labor practices charged to the Pennsylvania Railroad would interfere

¹ The Court of Appeals summarized the Board's interpretation of its power under Section 2, Ninth, as follows:

"The Board * * * insisted it had no jurisdiction * * * except as to coercion, threatened or practiced, while an election is in progress." (R. 114)

² Paragraph 44 alleges that the Board failed and refused to exercise the duty, and unlawfully exercised the power, vested in it by Section 2, Ninth, when, without first investigating or considering ORC's charges that Pennsylvania and BRT had collaborated in interfering with the conductors' choice of a representative, it held an election among the conductors and certified the winner thereof as the conductors' representative, and that the election and certification are therefore illegal and void. (R. 19-20)

with, influence or coerce the craft or class of road conductors in their choice of a bargaining representative was failing to perform its statutory duty: * * * For further answer these defendants allege: That the Board determined * * * that the instant charges did not allege carrier coercion directly affecting and occurring during the actual conduct of the election and that the Board therefore, as a matter of law, had no jurisdiction to consider the validity of these charges on the merits * * * " (R. 73-74)

While Petitioners disagree, as did the Court of Appeals,³ with the Board's definition of the power delegated to it by Section 2, Ninth, there is no denying that the definition is immune to challenge in the courts, for, as Mr. Justice Reed pointed out in his dissenting opinion, the *Switchmen's Union* decision "leaves the interpretation of the authority granted by Section 2, Ninth, finally to the Board" (320 U. S. 311). This being the case, Pennsylvania's argument that the federal courts have no power to entertain this suit to enforce the right guaranteed by Section 2, Third, because Section 2, Ninth, delegates to the Board the power to protect this right and this "Congressional specification of one method for the protection of the right excludes other methods" (including the judicial enforcement method), is unsound. It is unsound because the right guaranteed by Section 2, Third, can be violated by acts of carrier interference occurring *prior* to the holding of a

³ The Court of Appeals said:

"When the right of [ORC] to continue to represent Road conductors was challenged by [BRT] and it was charged that there was collusion between [BRT] and the Railroad, with the purpose of influencing the electors in casting their ballots, we think the Board should have investigated the charge before calling or holding an election. This seems to us to follow from the provisions of the Section of the Act under which the Board is required to function. The Board's justification that jurisdiction to police the election was confined to the event itself, and not the circumstances leading up to it, does not appeal to us. See *Texas & N. O. R. R. Co. v. Brotherhood &c.*, 281 U. S. 548." (R. 114-115)

representation election as well as by acts of carrier interference which occur *during* the progress of a representation election,⁴ and since the Board's power to protect the right is limited to acts which occur *during* an election, *no method* has been specified by Congress for protecting the right from acts of carrier interference which occur *prior* to an election; obviously, therefore, the principle that "Congressional specification of one method for the protection of a right normally excludes other methods," is not apposite in the instant case.

Pennsylvania has sought to escape the coils of this reasoning by representing to this Court that the Board declined to take action on ORC's charges of carrier interference and influence (i.e., the Board declined to postpone the election); not because it believed that it lacked the power to consider charges of carrier interference antedating an election, *but because it determined, on the basis of the facts underlying ORC's charges, that those charges were groundless.* Pennsylvania has asserted:

"Finally, it should be noted that in this case, as in the *Switchmen's Union* case, the Board was fully aware of the facts on the basis of which its certification is attacked. The [ORC] brought to the attention of the Board the charges of interference and coercion on the part of the Railroad. Those charges were before the Board when it issued its certification and, accordingly, the certification must be taken as a determination of the entire representation dispute including the allegations of carrier coercion." (Penna. br. 9)

⁴ The proposition that carrier conduct antedating the holding of an election can constitute "carrier interference and influence" within the meaning of Section 2, Third, has not been denied by either of the Respondents but has, in fact, been tacitly conceded by both of them. For this reason, the wealth of authority available to support the proposition will not be set forth at this stage of the proceedings before this Court.

⁵ In a footnote to these statements Pennsylvania says that the Board, in its brief on the merits of the appeal in the Court of Appeals,

The instant case is before this Court on a record which does not support, but unequivocally contradicts, these assertions. Its amended answer makes clear beyond doubt that the Board was *not* "fully aware of the facts" on which ORC's charges are based, and that the Board did *not* determine that those charges were groundless. The Board's amended answer denies

"that the Board, in not determining whether the labor practices charged to the Pennsylvania Railroad would interfere with, influence or coerce the craft or class of road conductors in their choice of a bargaining representative, was failing to perform its statutory duty; * * * For further answer these defendants allege: * * * that the instant charges did not allege carrier coercion directly affecting and occurring during the actual conduct of the election and that the Board therefore, as a matter of law, had no jurisdiction to consider the validity of these charges on the merits; * * * *that the Board has not passed upon and is not authorized to pass upon the validity of these charges on the merits* * * * (Italics supplied)" (R. 73-74)

"stated that another reason for its rejection of the [ORC's] charges was that those charges, even if true, did not set forth a case of carrier coercion or interference relating to the designation of a representative by the employees." (Penna. br. 9)

The only facts to be taken into account in considering whether a writ of certiorari should issue in this case are the facts disclosed by the record before this Court. Statements in the brief filed by the Board in the Court of Appeals which are not supported by the record, cannot properly be employed by Respondents in opposing the petition for a writ of certiorari.

⁶The above excerpt from the Board's amended answer deletes a statement in which the Board and its members "deny that the practices complained of constitute in fact unlawful coercion." This statement, if should be noted, denies merely that the practices charged did not constitute "coercion"; it does not deny that those practices constituted "interference" or "influence." That the three terms "coercion," "interference" and "influence," as used in Section 2, Third, of the Railway Labor Act, have different meanings, is well-recognized: See *Texas & N. O. R. Co. v. Ry. Clerks*, 281 U. S. 548, 568.

Pennsylvania, it is submitted, has failed in its attempt to establish that under the *Switchmen's Union* decision the federal courts have no jurisdiction to entertain the instant case and that therefore this case presents no question not already set at rest by this Court.

II.

The M-K-T and Southern Pacific Cases.

In an attempt to assimilate the instant case to *General Committee v. M-K-T R. Co.*, 320 U. S. 323, and *General Committee v. Sou. Pac.*, 320 U. S. 338, Pennsylvania has advanced the argument that the case involves merely a "jurisdictional dispute." (Penna. br. 14-17).

This argument is predicated upon what Pennsylvania insists is the gist of Petitioners' amended complaint:

"The petitioners' charges of coercion and influence on the part of the railroad *are based entirely* upon alleged violations of the petitioners' so-called bargaining rights." (Italics supplied) (Penna. br. 6)

It is reasoned from this premise that a decision whether Pennsylvania did coerce and influence the road conductors in their choice of a representative, as Petitioners charge, would necessitate a determination of the boundaries of ORC's jurisdiction as the conductors' representative, and that the Supreme Court ruled in the *M-K-T* and *Southern Pacific* cases, *supra*, that the federal courts have no power to make such a determination.

A fatal weakness of this argument is that it proceeds from a false premise—the premise that Petitioners' charges of carrier interference "are based *entirely*" upon alleged violations of ORC's jurisdictional rights as the conductors' bargaining agent.

It is quite true that the amended complaint contains several allegations the thesis of which is that Pennsylvania interfered with the conductors' choice of a representative by deliberately encroaching upon ORC's bargaining jur-

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isdiction, but it also contains several allegations charging that Pennsylvania interfered with the conductors' choice in other and devious ways. It is alleged that Pennsylvania and BRT conspired in an unlawful plan of action designed to weaken ORC and strengthen BRT in their respective standings with the conductors and thereby to interfere with and influence the conductors in their choice of a representative (R. 14, para. 25), and that Pennsylvania, in pursuance of this plan and

"in an effort to promote good will toward the BRT and weaken and discredit the ORC, sought to bring about a settlement of all claims filed by the BRT before the First Division of the National Railway Adjustment Board, and published and gave wide circulation to its proposed settlement * * * (R. 15, para. 28);

that Pennsylvania

"agreed to the said unlawful plan of action or program * * * to secure a commitment from the BRT to adjust time claims of road brakemen, pending before the First Division of the National Railway Adjustment Board, at greatly reduced amounts" (R. 16-17, para. 33);

and that, in pursuance of the aforementioned plan, Pennsylvania

"has engaged in dilatory tactics, has failed and refused to bargain and negotiate in good faith with ORC, * * * and is intentionally delaying negotiations with ORC to grant the BRT an opportunity to invoke the services of the Board under the provisions of the Railway Labor Act for a certification to represent the class or craft of road conductors and to obtain an election in such class or craft at a time when the working conditions of the conductors are in a state of uncertainty; and that the unlawful failure and refusal of the Penn RR to bargain and negotiate is embarrassing the ORC with its members." (R. 15-16, para. 29)

It is plainly evident that a court, on the trial of the instant case, would not have to determine the scope of ORC's jurisdiction as the road conductors' representative in order to decide whether petitioners had proved that Pennsylvania engaged in the conduct charged to it in the above-quoted allegations or in order to decide whether such conduct constituted carrier interference within the meaning of Section 2, Third, of the Act. Petitioners' charges of carrier interference are *not* "based entirely upon alleged violations of ORC's bargaining rights," therefore, and Pennsylvania's argument that the instant case involves no justiciable issue, is erroneous.

III.

The Railway Clerks and Virginian Railway Cases.

Petitioners contend in the brief filed with and in support of their petition for a writ of certiorari that the decision of the Court of Appeals in the instant case is contrary to this Court's decisions in *Texs. & N. O. R. Co. v. Ry. Clerks*, 281 U. S. 548, and *Virginian Ry v. Federation*, 300

It is clear that the quoted allegations are of such scope that on the trial of this case Petitioners could properly prove that Pennsylvania engaged in conduct which would constitute "carrier interference and influence" within the meaning of Section 2, Third, of the Act. This point will not be elaborated upon at this stage of the proceedings before this Court, and it will suffice to state here that proof of the allegation that Pennsylvania refused to bargain in good faith with ORC as the recognized representative of the road conductors regarding the rates of pay and working conditions, would prove that Pennsylvania had violated the conductors' right to a free choice. The District Court in the *Virginian Railway* case determined that the defendant Railway had violated Section 2, Third, stating:

"This unlawful interference and purpose to influence its employees has been evidenced chiefly through activities of the Railway in creating and promoting so-called independent organizations, both before and since the election and *by its fixed determination not to recognize or treat with the chosen representatives of the crafts unless they come from an organization under its control.*" (Italics supplied) (11 F. Supp. 621, 633)

U. S. 515, for the reason that in the *Railway Clerks* case this Court held that the federal courts have power to enforce Section 2, Third, and in the *Virginian Railway* case this Court indicated that the earlier holding remains in full force and effect. Respondents have advanced a novel argument to support the contrary view. (Penna. br. 8-11; BRT br. 16-21)

The *Railway Clerks* case, wherein the Supreme Court held Section 2, Third, of the Railway Labor Act of 1926 to be judicially enforceable, is said to provide no support for Petitioners' contention that the federal courts have power to entertain the instant suit to enforce Section 2, Third, of the Act as it now stands, for the reason that Section 2, Ninth, which was adopted into the Act by amendment in 1934, ousted the federal courts of their jurisdiction to enforce Section 2, Third, and conferred upon the Board the exclusive power of enforcement.

The *Virginian Railway* case is said to have "no application here because it dealt solely with a provision of the Act for which no means of enforcement, either administrative or judicial, was provided by Congress" (the provision in Section 2, Ninth, that the carrier shall "treat with" representatives certified by the Board). (Penna. br. 10)

The view that a 1934 amendment of the Railway Labor Act "reversed" the celebrated *Railway Clerks* decision, is believed unsound for the following reasons:

(1) The legislative history of the 1934 amendments to the Act is barren of even an intimation that, in enacting Section 2, Ninth, into the Act, Congress intended to transfer to the Board the power which had been held in the *Railway Clerks* case to repose in the federal courts. This silence suggests that such was not the Congressional intendment.

(2) Respondent's view is inconsistent with the view of this Court as expressed in the *Virginian Railway* case, which involved the Act as amended in 1934. In that case the present Chief Justice, after noting that the petitioner was

not challenging that part of the district court's decree which enjoined the petitioner from interfering with the free choice of representatives by its employees, stated:

"That contention is not open to it in view of our decision in the *Railway Clerks* case, *supra*, and of the unambiguous language of §2, Third and Fourth, of the Act, as amended." (300 U. S. 544)

(3). Further, Respondents' view is believed incompatible with Mr. Justice Douglas' treatment of the *Railway Clerks* and *Virginian Railway* cases in his opinions in *Switchmen's Union v. Federation, General Committee v. Sou. Pac.* and *General Committee v. M-K-T R. Co.*, *supra*. Mr. Justice Douglas' references to those cases are discussed at pages 15 and 16 of the brief filed with and in support of the petition for a writ of certiorari. In addition to what is there said, Petitioners would call attention to the fact that in the *M-K-T* case Mr. Justice Douglas, after quoting from the opinion in the *Railway Clerks* case, stated:

"Thus what had long been a 'right' of employees enforceable only by strikes and other methods of industrial warfare emerged as a 'right' enforceable by judicial decree."

And immediately following this observation, he stated that

"Further protection was accorded that right by the amendments which were added in 1934. Thus § 2, Ninth, provided machinery strengthening the representation provisions of the Act." (Italics supplied) (320 U. S. 330)

These remarks seem susceptible of but one construction: that the enforcement power which was held in the *Railway Clerks* case to repose in the courts, was supplemented, and not displaced, by the adoption of Section 2, Ninth, into the Act.

IV.

The Board as an Indispensable Party.

As a further reason why a writ of certiorari should not issue in this case, Pennsylvania has argued that Petitioners' failure to protest the Court of Appeals' decision in dismissing the appeal as to the Board precludes the granting of the relief which is being sought (the setting aside of the Board's certification of BRT as the road conductors' representative). (Penna. br. 12-16)

One ground on which Pennsylvania seems to base this argument is that Petitioners are urging that the certification should be set aside because the Board, in issuing it, improperly discharged its duties under Section 2, Ninth. Such is not the case. Petitioners do not question the propriety of any action or inaction on the part of the Board; rather, Petitioners are contending that Pennsylvania, in collaboration with BRT, violated the conductors' right to a free choice in the selection of a representative, and that the only relief which will vindicate the conductors' right to a free choice is the restoration of the parties to the positions they were in when the right was violated.

The alternate ground on which Pennsylvania concludes that the relief sought in this case cannot be granted is

"If the federal courts do not have the power to set aside a certification of the Board in a proceeding to which the Board is a party, it follows *a fortiori* that the certification cannot be nullified in a proceeding to which the Board is not a party." (Penna. br. 12)

The fact that the Board was a party to the *Switchmen's Union* case, and the fact that the federal courts had no power to set aside the certification involved in that case, do not compel the conclusion that in a suit to which the Board is not a party the federal courts have no power to set a certification aside. Pennsylvania apparently misunderstands the *Switchmen's Union* decision. That decision did not sanctify certifications as such. This Court

held in the *Switchmen's Union* case that the federal courts have no power to consider or decide whether the Board has properly performed the duties imposed upon it by Section 2, Ninth, and that, therefore, the federal courts cannot annul a certification on the ground that the Board has improperly performed its duties under Section 2, Ninth. Petitioners do not urge in this case that the courts should set aside the certification because the Board improperly discharged its duties under Section 2, Ninth. Petitioners are urging that the certification should be set aside because Pennsylvania, in collaboration with BRT, violated the conductors' right to a free choice. Petitioners are seeking judicial enforcement of a right which the Board declares it has no power to enforce.

In this connection it should be observed that the Board itself has conceded that its certification may be set aside on proof that, prior to the holding of the election, Pennsylvania engaged in conduct which interfered with the conductors' choice of a representative. In its amended answer the Board asserted that it had lacked the power to consider ORC's charges of carrier interference antedating the election and that the certification could not be set aside on the ground that the Board had failed to perform its duties when it refused to consider those charges. But the Board further said that the District Court had

"jurisdiction to consider the validity of these charges on the merits on evidence *de novo* * * * [and that the Board] would stand neutral * * * with respect to such issues." (R. 74)

V.

Petitioners' Standing to Complain.

Pennsylvania also has made much of the point that Petitioners have no standing in court to prosecute the instant suit. (Penna. br. 17-19)

Pennsylvania explains that the right created by Section 2, Third, is guaranteed to "employees," and is enforceable.

only at the instance of the employees themselves or their designated representative. None of the individual Petitioners, it is said, are "employees," and it is argued that Petitioner-ORC is no longer the designated representative of the employees here involved.

This argument assumes its own conclusion. If the federal courts do not grant the relief sought in this case, i.e., do not restore the parties to the positions they were in at the time Pennsylvania violated Section 2, Third, the argument that ORC is no longer the designated representative of the employees involved, will be unassailable; however, if the relief sought is granted, ORC will be restored as the representative of the employees here involved. Thus, the view that Petitioner-ORC has no standing to prosecute this suit assumes the conclusion that the relief sought never will be granted.

CONCLUSION.

It is respectfully submitted that, for the reasons set forth in the petition, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in this cause.

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CHARLES ELMORE CROPLEY

IN THE
Supreme Court of the United States

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OPINION BELOW.

The district court rendered no opinion; its judgment and order are found at R. 89. The opinion of the United States Court of Appeals for the District of Columbia is reported at 141 F. (2d) 366, and is printed in the record at R. 113-115.

JURISDICTION.

Ⓢ The judgment of the Court of Appeals was entered March 27, 1944. (R. 116) The petition for certiorari was filed August 29, 1944, and granted October 9, 1944. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended.

STATUTE INVOLVED.

The statute involved is the Railway Labor Act, as amended June 21, 1934 (c. 691, 48 Stat. 1185; 45 U. S. C. Sec. 151, *et seq.*). The pertinent provisions of the Act are set forth in the Appendix, *infra*, pp. 32-34.

STATEMENT.

In April, 1941, The Pennsylvania Railroad Company (hereinafter called Pennsylvania) served notice upon the Order of Railway Conductors of America (hereinafter called ORC), as the bargaining representative of the road conductors employed by Pennsylvania, and upon the Brotherhood of Railroad Trainmen (hereinafter called BRT), as the representative of the road brakemen, of its desire to revise the contract then governing the working conditions, rates of pay, etc., of the two crafts. That contract had been negotiated with Pennsylvania in 1927 by ORC and BRT jointly, and they agreed to negotiate jointly its revision. (R. 5-6)

Conferences between the two unions and Pennsylvania began in May, 1941, and continued until August 3, 1942, when ORC withdrew in protest against alleged attempts by Pennsylvania and BRT to deprive it of its rights as the conductors' bargaining agent. (R. 6-7) Less than two weeks after ORC's withdrawal and on August 14, 1942, Pennsylvania executed a new and separate contract with BRT. (R. 7)

On September 23, 1942, one week after its contract with Pennsylvania became effective, BRT invoked the ~~services~~ of the National Mediation Board (hereinafter called Board) to investigate an alleged representation dispute among the conductors and to certify BRT as the bargaining representative of that craft. (R. 17) On September 28, 1942, ORC advised the Board of its desire to file a resistance to the BRT invocation (R. 23), and in a letter addressed to the Board on October 28, 1942, ORC protested that a representation election should not be held among the conductors

"at this time" because Pennsylvania had been engaging in conduct prejudicial to ORC's reputation as a bargaining agent and such an election would not be free of "interference, influence and coercion by the carrier." (R. 17-18, 23-33)

The gravamen of the charges set forth in ORC's letter of protest was that, for the purpose of influencing the conductors to transfer the representation of their craft from ORC to BRT and in pursuance of a plan designed to accomplish that purpose, Pennsylvania and BRT had given wide publicity to certain circumstances and rumors which they had purposefully brought into being and which they intended would influence the conductors to believe that BRT was a more competent bargaining agent than ORC. The circumstances and rumors that Pennsylvania and BRT were charged with having created and publicized were, very briefly, BRT's success in securing a contract with Pennsylvania in two weeks' time, and Pennsylvania's refusal to negotiate and bargain with ORC; BRT's success in having certain favorable terms included in its contract with Pennsylvania, such as provisions creating work zones, and Pennsylvania's announced refusal to include similar terms in any contract with ORC; BRT's achievement in having included in its contract with Pennsylvania provisions governing the composition of the conductors' extra board and provisions creating a new craft of "assistant conductors" whose duties were to be those formerly performed by "additional conductors," and ORC's loss to BRT of the exclusive right to negotiate with Pennsylvania regarding the conductors' extra board and regarding the duties theretofore performed by "additional conductors"; and BRT's achievement in securing Pennsylvania's agreement to pay in full some 75 per cent of all BRT claims pending before the Railroad Adjustment Board. In the closing paragraph of the letter, ORC offered to present the Board with proof of its charges. (R. 17-18, 23-33)

On November 9, 1942, in response to ORC's letter of protest, the Board ruled that it had no alternative under the

Railway Labor Act but to proceed with the conduct of a representation election. (R. 33-40) The basis for its ruling was explained as follows:

"The contentions which you make regarding the carrier's influence arise out of circumstances antedating the Board's investigation of this case which was begun on November 2, 1942, circumstances in respect of which the Mediation Board possesses no jurisdiction. Our power in such matters is to insure that during the time of taking a secret ballot or in exercising other methods of ascertaining the choice of representatives, the employees shall be free from interference, influence, or coercion by the carrier. This, the Board can and will do within a prescribed area if, and when, an election is being held." (R. 38-39)

On November 27, 1942, ORC and four of its officers (the petitioners herein) filed a complaint in the District Court of the United States for the District of Columbia against BRT and Pennsylvania. (R. 1-17)¹ The allegations in this complaint elaborated upon the charges that had been set forth in ORC's letter of protest.

The complaint alleged that Pennsylvania and BRT had conspired in an unlawful plan of action designed to discredit and weaken ORC and strengthen BRT in their respective standings with the conductors and thereby to interfere with and influence the conductors in their choice of a representative (R. 14), and that Pennsylvania had agreed to this plan in order to obtain certain financial advantages (R. 16-17). It alleged that, pursuant to this plan, Pennsylvania and BRT invaded and encroached upon ORC's jurisdictional rights as representative of the conductors by including in their contract of August 14, 1942, provisions creating a new class of "assistant conductors" to do the work formerly done by "additional conductors" (in respect of whose work ORC had enjoyed the exclusive right to bargain with Pennsylvania) (R. 14-15), and provisions gov-

¹ The two counts contained in this complaint were retained without change as Counts I and II of the amended complaint.

erning the composition and control of the conductors' extra board (the operation and maintenance of which had for many years been under the bargaining jurisdiction of ORC) (R. 14-15), and that Pennsylvania caused the contract containing these provisions to be rushed to publication and widely circulated among the conductors (R. 15). The complaint alleged that in pursuance of the plan and purpose aforesaid, Pennsylvania agreed to settle the claims which had been filed with the Adjustment Board by BRT in behalf of its members, and that Pennsylvania caused copies of this settlement agreement to be widely circulated among the conductors. (R. 14-15) The complaint further alleged that Pennsylvania had engaged in dilatory tactics, had failed and refused to bargain and negotiate with ORC as the representative of the conductors, and that Pennsylvania intentionally delayed negotiations with ORC in order that BRT could cause a representation election to be held among the conductors at a time when ORC's reputation as a bargaining agent was impaired. (R. 12, 15-16)

The complaint requested the court to declare that ORC, as the conductors' representative, had the exclusive right to bargain with Pennsylvania regarding the working conditions of that craft, and that the provisions in the BRT-Pennsylvania contract relating to "assistant conductors" and to the conductors' extra board, were void. The complaint further requested the court to enjoin Pennsylvania from negotiating with BRT regarding the working conditions of the craft of conductors, and to direct Pennsylvania to negotiate with ORC regarding the working conditions of that craft. (R. 21-22)²

On December 2, 1942, six days after this complaint was filed, the Board ordered a representation election to be held among the conductors. (R. 19) The election was conducted during the two weeks December 5-19, BRT received the majority of the votes cast at the election, and on December

² The prayer for relief in this complaint was incorporated without change in the prayer for relief in the amended complaint as paragraphs (3)-(9) thereof.

27, the Board certified BRT as the duly designated representative of the craft. (R. 19) The petitioners thereupon amended their complaint by adding a third count thereto and joining the Board as a party defendant. (R. 17-20) Count III recited what had occurred in the case after BRT's filing of an invocation with the Board on September 23, 1942, and alleged that the election and certification should be set aside for either of two reasons: *First*, because the Board had failed to perform its duty under the Railway Labor Act when it refused to determine whether Pennsylvania had, as ORC charged, engaged in conduct which would interfere with and influence the conductors' choice of a representative, and *secondly*, because Pennsylvania had in fact engaged in conduct which interfered with and influenced the conductors' choice. (R. 19-20)

The amended complaint added two paragraphs to the original prayer for relief, requesting (1) that the election and certification be set aside, and (2) that the Board be enjoined from holding a further election until such time as it should determine that the conduct charged to Pennsylvania did not constitute carrier interference and influence, or, in the alternative, that the conduct charged to Pennsylvania be declared to constitute carrier interference and influence and that the Board be enjoined from holding a further election until such time as it should determine such interference and influence had ceased. (R. 20-21)

In answering this amended complaint, the Board acknowledged that it had refused to investigate or consider the charges of carrier interference and influence contained in ORC's letter of protest, it reasserted the view that it had no power or duty under the Act to investigate or consider those charges because they related to acts of carrier interference antedating the election, and it contended that the election and certification could not be set aside on the ground that it had failed to perform its statutory duty. (R. 59-64, 73-74) Upon being served with a copy of the Board's answer and on March 8, 1943, the petitioners filed a motion for summary judgment against the Board, de-

manding that the election and certification be set aside and the Board enjoined from holding a further election until such time as the Board should determine, after investigation and consideration of the conduct charged to Pennsylvania, that such conduct had ceased or would not interfere with the conductors in their choice of a representative. (R. 65-72)

The question of law which this motion posed for the district court's decision was whether the election and certification were illegal by reason of the fact the Board had conducted the election and issued the certification without first investigating or considering ORC's charges that Pennsylvania had been interfering with and influencing the conductors in their choice of a representative. The motion was argued in May, and on June 11, 1943, the district court,

" * * * being of the opinion that there [was] no genuine issue as to any material fact with respect to the relief requested under the motion for summary judgment, but being of the further opinion that the facts admitted as true and all other facts alleged in the complaint and amended complaint of the plaintiffs, [did] not establish that the plaintiffs [had] a cause of action * * * "

entered a judgment and order dismissing the motion for summary judgment, and *the complaint and amended complaint as well.* (R. 89)

An appeal from this judgment and order was noted June 14, 1943. (R. 90) Before the appeal came on for argument, however, this Court entered decisions in three cases involving the Railway Labor Act, viz., *Switchmen's Union v. Board*, 320 U. S. 297; *General Committee v. M. K. T. R. Co.*, 320 U. S. 323; *General Committee v. Sou. Pac. Co.*, 320 U. S. 338, and, in reliance upon those decisions, motions were filed to dismiss the appeal as to each of the appellees on the ground that neither the district court nor the Court of Appeals had jurisdiction over the subject matter involved. (R. 92, 95-99, 104-105)

In opposing these motions, the petitioners conceded that under this Court's decision in the *Switchmen's Union* case,

supra, the district court and the Court of Appeals may have had no jurisdiction to consider the question raised by the motion for summary judgment—the question whether the election and certification were illegal by reason of the fact the Board had conducted the election and issued the certification without first investigating or considering ORC's charges that Pennsylvania had been interfering with and influencing the conductors in their choice of a representative. Consistently with this concession, the petitioners acknowledged that the motion to dismiss the appeal as against the Board probably should be granted.

The petitioners contended that the district court and the Court of Appeals did have jurisdiction, however, to decide whether Pennsylvania in fact had interfered with and influenced the conductors in their choice of a representative, and, in the event it should decide that question in the affirmative, to vindicate and enforce the conductors' right to a free choice by setting aside the election and certification. The petitioners urged in support of this contention that the "right" guaranteed to employees by Section 2, Third, of the Act—the "right" to select representatives "without interference, influence or coercion" by the carrier—can be violated *prior* to the date of a representation election as well as by acts and conduct of the carrier "during the time" the election is being held; that the Board had ruled it has no power to enforce this right against acts of carrier interference occurring *prior* to the holding of an election; that unless the federal courts have a power to enforce this right against acts of carrier interference occurring *prior* to the holding of an election, this right would be obliterated; and that this Court in the *Switchmen's Union* case, *supra*, reaffirmed the principles laid down in *Texas & N. O. R. Co. v. Ry. Clerks*, 281 U. S. 548; and *Virginian Ry. v. Federation*, 300 U. S. 515, and acknowledged the existence of power in the federal courts to enforce a right created by Congress in instances where the lack of such power would mean a sacrifice or obliteration of the right. It was urged that the

9
federal courts' power to enforce the right against acts of carrier interference antedating an election necessarily is sufficiently broad to include the power to annul the election and certification if annulment is essential to the effective enforcement of the right.

On March 27, 1944, the Court of Appeals dismissed the appeal as to all parties. (141 F. (2d) 366; R. 113-115). It expressed the opinion that the Board should have investigated ORC's charges of carrier interference before calling or holding an election, but it concluded that the petitioners' appeal should be dismissed, "on the authority of the decision of the Supreme Court in *Switchmen's Union v. National Mediation Board*, 320 U.S. 297." (141 F. (2d) at 367; R. 114-115). It was the Court of Appeals' view that

"after the election had been held and the majority of the votes had been cast and counted for [BRT] and the Board had certified it as the bargaining representative, the decisions of the Supreme Court in the cases we have referred to, as well as in the *Missouri-Kansas* and *Southern Pacific* cases decided the same day, as we understand their purport, foreclose the question we have here and deprived the courts of all rights of interference." (141 F. (2d) at 367-368; R. 115)

On August 29, 1944, this Court was petitioned to issue a writ of certiorari to review the judgment of the Court of Appeals dismissing the appeal as to Pennsylvania and BRT; no review was sought of the Court of Appeals' judgment insofar as it dismissed the appeal as to the Board. The petition for certiorari was granted October 9, 1944.

QUESTION PRESENTED.

Does the district court have the power under Section 24(8) of the Judicial Code—

(a) to entertain the petitioners' suit to vindicate and enforce the conductors' right under Section 2, Third, of the Act, it being charged in the amended complaint that prior to the holding of a representation elec-

tion among the conductors Pennsylvania engaged in conduct which interfered with and influenced the conductors in their choice of a representative, and

- (b) in the event it decides the charges are true, to vindicate and enforce the conductors' right to a free choice by setting aside the election and certification of BRT as the conductors' representative?

SUMMARY OF ARGUMENT.

This Court's decision in *Switchmen's Union v. Board*, 320 U. S. 297, *General Committee v. M-K-T. R. Co.*, 320 U. S. 323, and *General Committee v. Sou. Pac. Co.*, 320 U. S. 338, do not govern the subject case and the Court of Appeals erred in dismissing the appeal on the ground that those decisions precluded the federal courts from entertaining the petitioners' suit.

A. In the *M-K-T* and *Southern Pacific* cases, *supra*, this Court decided that the district courts have no power to settle "jurisdictional disputes." Those decisions are not applicable here.

First, the petitioners' suit is based in a substantial measure upon allegations of conduct by Pennsylvania which is asserted to have violated the conductors' right to a free choice, but is not asserted to have violated ORC's jurisdiction, as bargaining agent for the conductors.

Secondly, although the petitioners' suit is based in part upon allegations of conduct by Pennsylvania which is asserted to have violated both the conductors' right to a free choice and ORC's jurisdiction as the conductors' bargaining agent, a decision whether such conduct did interfere with and influence the conductors' choice will not necessitate a determination whether it also violated ORC's jurisdiction as the conductors' bargaining agent.

Thirdly, the *M-K-T* and *Southern Pacific* decisions should not be construed to preclude the district court from defin-

ing the jurisdiction of a craft if such definition is merely incidental but necessary to the judicial enforcement of the right guaranteed by Section 2, Third, of the Act. To so construe those decisions would open a loop-hole in the prohibition against interference by the carrier with its employees' right under Section 2, Third, to a free choice in the selection of representatives. This Court's decision that the district courts have no power to resolve "jurisdictional disputes" stemmed from the fact that judicial settlement of such disputes is not essential to the enforcement of any rights created and guaranteed by the Railway Labor Act,—the fact that the lack of power in the district courts to settle such disputes will not result in the sacrifice of any of the disputants' rights under the Act. Accordingly, those decisions should not be applied in an instance where judicial definition of jurisdiction is necessary to the enforcement of the right guaranteed by Section 2, Third.

B. This Court decided in the *Switchmen's Union* case that the district courts have no power to entertain a suit to enforce the right guaranteed by Section 2, Fourth, of the Act to the "majority of any craft or class of employees" to "determine who shall be the representative of the craft or class," because Section 2, Ninth, of the Act gives the Board the exclusive power to enforce that right. The Board's enforcement power being exclusive, it followed *a fortiori* that the district court could not entertain the Switchmen's suit to enforce the right against alleged violations resulting from the Board's exercise of its functions under Section 2, Ninth.

1. The *Switchmen's Union* decision neither compels nor supports the conclusion reached by the Court of Appeals that the district court has no power to entertain the petitioners' suit to enforce the right of employees under Section 2, Third, of the Act to choose representatives "without interference, influence or coercion" by the carrier, for the obvious reason that this Court did not decide (or even

intimate) that the Board has an exclusive power to enforce Section 2, Third.

2. On the other hand, this Court's reasoning in the *Switchmen's Union* case, if followed here, leads to the conclusion that the district court does have the power to entertain the petitioners' suit and to grant the relief it seeks.

This Court concluded in the *Switchmen's Union* case that the district court could not enforce the "majority" right guaranteed by Section 2, Fourth, because Congress gave the Board an exclusive power to enforce that right. In the instant case, although Congress has given the Board a power under Section 2, Ninth, to enforce the right guaranteed by Section 2, Third, it is established by decisions of this Court and by the rulings of the Board itself that the Board's enforcement power is not exclusive. This being so, the right is judicially enforceable.

In the *Switchmen's Union* case this Court acknowledged that the district courts have the power to enforce rights created and guaranteed by the Railway Labor Act in instances where the lack of such a power would result in the sacrifice of those rights, but concluded that the district court did not have the power to entertain the *Switchmen's* suit to enforce the "majority" right under Section 2, Fourth, because the Board has adequate enforcement power to prevent the sacrifice of that right. Under this reasoning, the district court has the power to entertain the petitioners' suit to enforce the right guaranteed by Section 2, Third, against acts of carrier interference antedating the representation election held among the conductors. This is so because the Board has no power to protect the right guaranteed by Section 2, Third, from carrier interference antedating a representation election, and lack of such a power in the district court would leave that right entirely unprotected from pre-election interference and result in its sacrifice. And since the district court has the power to enforce the right for the reason that judicial enforcement is necessary to prevent the sacrifice of the right, it follows

that the district court may annul the election and certification of BRT as the conductors' representative because no other relief will prevent the sacrifice of the conductors' right to choose a representative without interference by Pennsylvania.

ARGUMENT.

Soon after this Court entered its decisions in the *Switchmen's Union*, *M-K-T*, and *Southern Pacific* cases, *supra*, motions were filed to dismiss the petitioners' appeal for lack of jurisdiction over the subject matter involved.

In opposing those motions, the petitioners conceded that under this Court's decision in the *Switchmen's Union* case, *supra*, the district court and the Court of Appeals probably have no jurisdiction to entertain the instant suit insofar as it contends that the Board, in refusing to investigate or consider ORC's charges of carrier interference, failed to perform its duty under Section 2, Ninth, of the Railway Labor Act. The petitioners make the same concession here.

The petitioners contended that the district court and the Court of Appeals do have the power to entertain the instant suit, however, insofar as it calls upon them (a) to decide whether, prior to the holding of a representation election among the conductors, Pennsylvania interfered with and influenced the conductors in their choice of a representative, and (b) if it is decided that Pennsylvania did so interfere, to vindicate and enforce the conductors' right to a free choice by setting aside the election and certification of BRT as their representative.

Citing this Court's decisions in the *Switchmen's Union*, *M-K-T* and *Southern Pacific* cases as authority for its action, the Court of Appeals dismissed the petitioners' appeal for lack of jurisdiction. (141 F. (2d) 366; R. 113-115).

The Court of Appeals Erred in Deciding that this Court's Decisions in the M-K-T, Southern Pacific and Switchmen's Union Cases Required Petitioners' Appeal to be Dismissed for Lack of Jurisdiction.

A. The M-K-T and Southern Pacific Decisions.

The *M-K-T* and *Southern Pacific* cases, *supra*, both involved suits brought by a representative of a craft of employees against the employer-carrier and the representative of another craft of employees for a judgment declaring that certain provisions in a contract between the defendants were illegal and void under the Railway Labor Act because they related to employees belonging to the craft represented by the plaintiff. Thus, in both cases the courts were asked to define the boundary between two crafts of employees.

This Court ruled in those cases that the district courts have no power to resolve such "jurisdictional disputes," two justices dissenting and one concurring only in the result. As explained by the majority, the basis for this ruling was that the history and structure of the Railway Labor Act show that Congress did not intend for "jurisdictional disputes" to be settled by the courts, but intended that such disputes should be settled by mediation, arbitration or conciliation.

The Court of Appeals identified the instant case as one involving a "jurisdictional dispute" (141 F. (2d) at 366, 367; R. 113, 114), and stated that this Court's decisions in the above cases required the petitioners' appeal to be dismissed for lack of jurisdiction (141 F. (2d) at 367; R. 115). The basis for the Court of Appeals' view that this case involves merely a "jurisdictional dispute" is not explained in its *per curiam* opinion. Apparently, however, the Court agreed with the appellees that the charges of carrier interference set forth in the amended complaint are based entirely upon alleged violations of ORC's bargaining jurisdiction as the conductors' representative, and that a decision whether Pennsylvania did interfere with the conductors' choice in

the manner charged would necessitate a determination of the scope of ORC's jurisdiction as the conductors' representative—a determination which, according to the *M-K-T* and *Southern Pacific* decisions, the federal courts have no power to make.

The petitioners do not believe the *M-K-T* and *Southern Pacific* decisions support the conclusion that the federal courts have no power to entertain the subject case.

1. The petitioners' amended complaint contains several allegations charging that Pennsylvania interfered with the conductors' choice in other ways than by violating their representative's bargaining jurisdiction.

It is alleged in the amended complaint that Pennsylvania and BRT conspired in an unlawful plan of action designed to weaken ORC and strengthen BRT in their respective standings with the conductors and thereby to interfere with and influence the conductors in their choice of a representative (R. 14), and that Pennsylvania, in pursuance of this plan and

in an effort to promote good will toward the BRT and weaken and discredit the ORC, sought to bring about a settlement of all claims filed by the BRT before the First Division of the National Railway Adjustment Board, and published and gave wide circulation to its proposed settlement. (R. 15):

that Pennsylvania

agreed to the said unlawful plan of action or program to obtain substantial financial advantage and to secure a commitment from the BRT to adjust time claims of road brakemen, pending before the First Division of the National Railway Adjustment Board, at greatly reduced amounts. (R. 16-17):

and that, in pursuance of the aforementioned plan, Pennsylvania

has engaged in dilatory tactics, has failed and refused to bargain and negotiate in good faith with ORC,

and is intentionally delaying negotiations with ORC to grant the BRT an opportunity to invoke the services of the Board under the provisions of the Railway Labor Act for a certification to represent the class or craft of road conductors and to obtain an election in such class or craft at a time when the working conditions of the conductors are in a state of uncertainty; and that the unlawful failure and refusal of the Penn RR to bargain and negotiate is embarrassing the ORC with its members." (R. 15-16)

It is plainly evident that the district court, on the trial of the instant case, would not have to determine the scope of ORC's jurisdiction as the road conductors' representative in order to decide whether Pennsylvania in fact had engaged in the conduct charged to it in the above-quoted allegations or in order to decide whether such conduct, if proved, constituted carrier interference or influence within the meaning of Section 2, Third, of the Act. Clearly, therefore, the *M-K-T* and *Southern Pacific* decisions are not dispositive of this case.

2. The petitioners' amended complaint alleges that Pennsylvania and BRT conspired in an unlawful plan of action:

"designed to embarrass, discredit, and weaken the ORC and to assist and strengthen the BRT and thereby to influence, coerce, and interfere with the craft and class of road conductors in their choice of a collective bargaining representative." (R. 14).

and that Pennsylvania, "in pursuance of said unlawful plan,"

"while purporting to conduct joint negotiations, made a private and secret agreement with the BRT to carve out of the road conductors' work a purported new class or craft of 'assistant conductors'; that, by private and secret agreement, the Penn RR also negotiated with the BRT with regard to the manning, creation, and control of a conductors' extra board; and

that such action was a clear invasion of the jurisdictional province and representative rights of the ORC as the lawful bargaining agent of the class and craft of conductors, and was done for the purpose of strengthening the BRT and weakening and embarrassing the ORC in their respective standings with the class and craft of conductors." (R. 14-15)

It is further alleged that the secret agreement between Pennsylvania and BRT to create a new craft of "assistant conductors" and to establish BRT as bargaining agent with respect to the conductors' extra board, was incorporated in the Pennsylvania-BRT contract of August 14, 1942, which Pennsylvania rushed to publication and circulation among the conductors. (R. 15) The complaint alleges that for more than twenty years prior to the time they entered into said secret agreement, Pennsylvania and BRT had recognized that ORC, as the conductors' representative, had the authority to negotiate with Pennsylvania respecting the composition and maintenance of the conductors' extra board and respecting the work which under the Pennsylvania-BRT contract of August 14, 1942, was to be performed by the "assistant conductors." (R. 41-42)

An examination of the above summarized allegations apparently persuaded the Court of Appeals to the view that, on the trial of the petitioners' suit to enforce Section 2. Third, a decision whether Pennsylvania had interfered with and influenced the conductors in their choice of a representative would necessitate a determination of the point where the exclusive jurisdiction of the craft of road conductors ends and the authority of the craft of road brakemen begins. The Court of Appeals apparently reasoned that the question whether Pennsylvania violated the conductors' right to a free choice depends upon whether the provisions in the Pennsylvania-BRT contract of August 14, 1942, pertaining to the conductors' extra board and "assistant conductors" infringed upon ORC's bargaining authority as the conductors' representative, and that under the *M-K-T*.

and *Southern Pacific* decisions there is no judicial power to make such a determination.

However, the petitioners believe it is unnecessary to determine whether Pennsylvania's action with respect to the conductors' extra board and "assistant conductors" infringed upon ORC's authority as bargaining agent for the conductors in order to decide if that action by Pennsylvania interfered with and influenced the conductors in their choice of a representative. In this suit to enforce Section 2, Third, the question is not whether Pennsylvania violated ORC's jurisdictional rights as a bargaining agent, but whether Pennsylvania violated the conductors' right under Section 2, Third, to a free choice, and it is a self-evident fact that the conduct of a carrier may violate its employees' right to a free choice without violating the bargaining jurisdiction of their representative.

Section 2, Third, provides that

Representatives, for the purposes of this Act shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives."

It is seen that a carrier is prohibited from "in any way" interfering with or influencing its employees in their "choice of representatives." The petitioners submit that, within the meaning of Section 2, Third, any act by the carrier (a) which the carrier is under no legal duty to do and (b) which in fact interferes with or influences the employees in their choice of a representative, constitutes carrier interference or influence. On the trial of this case, therefore, it must be decided that Pennsylvania's action with respect to the conductors' extra board and "assistant conductors" violated the conductors' right under Section 2, Third, if it is shown that such action did "discredit and weaken ORC and strengthen BRT in their respective standings with the craft of road conductors," or that it otherwise in-

fluenced the conductors' choice. The fact that but for the prohibition against carrier interference in Section 2, Third, Pennsylvania's action was lawful, is of no significance; it is no defense to the charge of carrier interference that Pennsylvania's action did not violate ORC's jurisdiction as the conductors' bargaining agent.

3. Even if this Court should rule that the district court would have to determine whether Pennsylvania's action with respect to the conductors' extra board and the "assistant conductors" violated ORC's jurisdiction as the conductors' representative in order to decide whether that action interfered with the conductors' choice, it does not necessarily follow that the *M-K-T* and *Southern Pacific* decisions would preclude the district court from making such a determination.

The suit herein seeks to vindicate and enforce the conductors' right under Section 2, Third, of the Act to choose a representative without interference or influence by Pennsylvania. There is no reason to believe, but every reason to doubt, that this Court intended by its decisions in the *M-K-T* and *Southern Pacific* cases to impair the right of employees to select representatives "without interference, influence or coercion" by the carrier. Those decisions will impair, if not destroy, that right, however, if they are so construed as to support the conclusion that the district court lacks the power to entertain the instant suit insofar as it charges that Pennsylvania's action with respect to the conductors' extra board and "assistant conductors" violated the conductors' right to a free choice.

Under those decisions, so construed, a carrier will be at liberty to interfere with and influence its employees' choice

³ The record does not show that BRT had been certified by the Board as the representative for employees listed on the conductors' extra board or for employees performing the work of "assistant conductors," at the time it entered into a contract with Pennsylvania regarding the work of such employees. Therefore, Pennsylvania cannot claim that it was required by law to enter into such contract.

by refusing to respect or by otherwise violating the jurisdiction of their representative. And what more effective method is there for inducing a craft of employees—a craft of road conductors, for example,—to transfer their representation from, let us say, ORC to BRT, than the method under which the carrier (a) refuses to negotiate with ORC respecting the work and pay of the road conductors, but (b) negotiates a contract with BRT which, among other things, improves the working conditions and increases the pay of a segment of the craft of road conductors?

If judicial enforcement of Section 2, Third, will require judicial definition of jurisdiction, it is necessary to reconcile the rule that the district courts have no power to resolve "jurisdictional disputes" with this Court's decision in the *Railway Clerks* case (*Texas & N. O. R. Co. v. Ry. Clerks*, 281 U. S. 548), that Section 2, Third, is judicially enforceable. Until and unless this Court decides to the contrary, the petitioners will hold to the opinion that where the definition of jurisdiction is incidental but necessary to the enforcement of Section 2, Third, the *M-K-T* and *Southern Pacific* decisions should not be applicable. The contrary conclusion will facilitate circumvention of the statutory prohibition against carrier interference, and, as Chief Justice Hughes stated in the *Railway Clerks* case, *supra* (281 U. S. at 569), "Freedom of choice in the selection of representatives . . . is the essential foundation of the statutory scheme."

The petitioners submit, moreover, that to hold the courts may define jurisdictional boundaries in the exercise of their power to enforce Section 2, Third, will not, as a matter of fact, do violence to the *M-K-T* and *Southern Pacific* decisions. In the last analysis, the reason why the courts have no power to settle "jurisdictional disputes" is because judicial resolution of such disputes is not necessary to the enforcement of any specific right under the Act, or, stated differently, because the lack of power in the courts to decide such disputes will not result in the loss by either of

the disputants of any of its rights under the Railway Labor Act. In his opinions in those cases, Mr. Justice Douglas examined each provision of the Act cited by the various litigants to support their respective contentions, and concluded that none of the litigants' rights under the Act were at stake. If, therefore, the definition of jurisdiction is an essential, preliminary step in the enforcement of one of the most important of the rights guaranteed by the Act, the right to freedom of choice, the *raison d'être* of the *M-K-T*, and *Southern Pacific* decisions is absent.

B. The Switchmen's Union Decision.

The facts involved in the *Switchmen's Union* case, *supra*, were quite simple. The Brotherhood of Railroad Trainmen invoked the services of the Board to investigate a representation dispute among the yardmen of the New York Central Railroad Company. BRT claimed that the yardmen employed on all the rail lines operated by the New York Central constituted a single craft of employees and that a majority of that craft desired to be represented by it. The Switchmen's Union protested to the Board that certain of the rail lines operated by the New York Central were separate carriers and that the yardmen on each of those particular lines constituted a separate craft of employees. The Switchmen's Union contended that each of those separate crafts should be permitted to vote for a separate representative and not be compelled to participate in a system-wide election.

Section 2, Ninth, of the Railway Labor Act provides that the Board "shall designate who may participate in the election" of representatives; and, in the exercise of that function, the Board resolved the controversy between the BRT and the Switchmen's Union in the former's favor by ruling that all lines operated by the New York Central constituted a single carrier and that it had "no discretion to split a single carrier . . . for the purpose of determining who shall be eligible to vote for a representative of a craft or

class of employees." Pursuant to this ruling a system-wide election was held and BRT, being the recipient of a majority of the votes cast, was certified by the Board as the representative of the yardmen.

The Switchmen's Union thereupon filed suit in a district court to have the "determination of the Board of the participants in the election, and the certification of the Brotherhood of Railroad Trainmen as the representative of the yardmen, cancelled." The thesis of the Switchmen's suit was that the action taken by the Board under the purported authority of Section 2, Ninth, had deprived yardmen on certain of the rail lines operated by the New York Central of the right guaranteed them by Section 2, Fourth, of the Act—the "right" of a "majority of any craft or class of employees" to "determine who shall be the representative of the craft or class."

The district court dismissed the suit and its judgment was affirmed on appeal. Both lower courts treated as the decisive issue in the case the question whether the Board had properly exercised its functions under Section 2, Ninth, i.e., whether Section 2, Ninth, gives discretion to the Board to split the crafts of a single carrier into smaller units so that the members of such units may choose representatives of employees.

On certiorari, this Court held that the district court "did not have the power to review the action of the National Mediation Board in issuing the certificate" (320 U. S. at 300), three justices dissenting. As explained in the majority opinion, the basis for this holding was that Congress, in adopting Section 2, Ninth, into the Act, delegated to the Board the exclusive power to enforce the "right" which the Switchmen's suit sought to enforce in the courts. The view that the Board's enforcement power was intended by Congress to be exclusive, followed from the majority's appraisal of the evolution and structure of the Railway Labor Act.

The Court of Appeals was of the opinion that the motions to dismiss the petitioners' appeal in the instant case for lack of jurisdiction "must be granted on the authority of the decision of the Supreme Court in *Switchmen's Union v. National Mediation Board*, 320 U. S. 297" (141 F. (2d) at 362; R. 114).

1. The petitioners do not believe the *Switchmen's Union* decision supports the conclusion that the federal courts have no jurisdiction over the subject matter of the instant case.

The problem here is whether the federal courts have the power to entertain a suit which seeks to vindicate and enforce the conductors' right under Section 2, Third, of the Act to choose a representative without interference or influence by Pennsylvania. The problem in the *Switchmen's Union* case was whether the federal courts had the power to entertain a suit which sought to vindicate and enforce the right of the "majority" of a craft of employees under section 2, Fourth, of the Act "to determine who shall be the representative of the craft."

This Court held that the district court had no jurisdiction to entertain the *Switchmen's* suit to enforce the "majority" right guaranteed by Section 2, Fourth; it did not decide that a district court has no jurisdiction to entertain a suit to enforce the right guaranteed by Section 2, Third. The basis for this Court's holding was that the Board has the exclusive power to enforce the "majority" right under Section 2, Fourth; this Court did not decide or even intimate that the Board has the exclusive power to enforce the right guaranteed by Section 2, Third. Clearly, the *Switchmen's Union* decision neither compels nor supports the conclusion reached by the Court of Appeals that the courts have no jurisdiction over the subject matter of this case.

2. On the other hand, if the tests employed by this Court to resolve the question whether the district court had the

power to entertain the Switchmen's suit are applied to resolve the problem here, the conclusion is reached that the district court does have the power to entertain the petitioners' suit.

a. As noted above, this Court decided in the *Switchmen's Union* case that the district court had no power to entertain a suit to enforce the "majority" right guaranteed by Section 2, Fourth, because Congress delegated to the Board a power to enforce that right, and, since Congressional specification of one method for the enforcement of a right normally excludes other methods, the Board's power is exclusive. Adapting that test to this case, the conclusion is reached that the district court has the power to entertain the petitioners' suit to enforce the right guaranteed by Section 2, Third, because Congress has *not* delegated to the Board an exclusive power to enforce that right.

It is true that Congress vested the Board with a power to enforce the right guaranteed by Section 2, Third, when, in 1934, it adopted the following provision into the Act as a part of Section 2, Ninth:

"In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier."

But the enforcement power which this provision delegates to the Board is not an exclusive power.

First, this Court held in the *Railway Clerks* case, *supra*, that the federal courts had the power to enforce the right guaranteed by Section 2, Third, of the Railway Labor Act of 1926; and in *Virginian Ry. v. Federation*, 300 U. S. 515, which involved the Railway Labor Act of 1926, as amended in 1934, this Court, after noting that the petitioner was not contesting that part of the district court's decree which

enjoined the petitioner from interfering with its employees' choice of representatives, stated (544):

"That contention is not open to it in view of our decision in the *Railway Clerks* case, *supra*, and of the unambiguous language of § 2, Third and Fourth, of the Act, as amended."

And again in the *Switchmen's Union* and *M-K-T* cases, this Court expressly acknowledged that the *Railway Clerks* case is authority to this day for the proposition that the right guaranteed by Section 2, Third, is judicially enforceable. (320 U. S. 297, 300; 320 U. S. 323, 327, 329) See also, *Stark v. Wickard*, 321 U. S. 288, 306-307.

Secondly, the Board itself has declared that its power under Section 2, Ninth, to enforce the right guaranteed by Section 2, Third, is neither exclusive nor complete. In its answer to the petitioners' amended complaint, the Board reasserted its earlier ruling that it has no power to enforce the right except against acts of carrier interference occurring "during the time" an election is being held, and stated that

"this Court has jurisdiction to consider the validity of these charges on the merits on evidence *de novo*" (R. 74)

It appearing that the Board's power to enforce the right guaranteed by Section 2, Third, is not exclusive, it follows under the *Switchmen's Union* decision that the district court has the power to enforce that right.

b. This Court, noting that "it is for Congress to determine how rights which it creates shall be enforced" (320 U. S. at 301), considered as decisive of the *Switchmen's Union* case the inquiry whether Congress intended that the broad grant of general jurisdiction embodied in Section 24(8) of the Judicial Code (28 U. S. C. § 41(8)) should empower the district courts to enforce the "majority" right created and guaranteed by Section 2, Fourth, of the Act.

This Court acknowledged the principle (as established by the *Railway Clerks and Virginian Railway cases, supra*) that in instances where the absence of jurisdiction of the district courts would mean a sacrifice or obliteration of a right which Congress has created, it is to be inferred that Congress intended Section 24(8) of the Judicial Code should empower the district courts to enforce the right, but declared that "Such considerations are not applicable here" (320 U. S. at 300) because the right sought to be enforced in the Switchmen's suit "is protected by § 2, Ninth, which gives the National Mediation Board the power to resolve controversies concerning it" (320 U. S. at 301).

In the instant case, the decisive inquiry is whether Congress intended that Section 24(8) of the Judicial Code should empower the district court to enforce the right which it created and guaranteed in Section 2, Third. And, under the principle which this Court recognized as controlling in such instances, it is to be inferred that Congress did intend that Section 24(8) should empower the district court to entertain the petitioners' suit to enforce the right guaranteed by Section 2, Third, against pre-election carrier interference because the lack of such power would result in the sacrifice or obliteration of that right.

That the lack of power in the district court to entertain the petitioners' suit would result in the sacrifice or obliteration of the right to freedom of choice in the selection of representatives, follows from the fact that the Board has no power to protect that right from carrier interference and influence antedating a representation election. Since

* The Board itself is authority for the statement that it has no power to protect the right from carrier interference antedating an election. The Board so ruled during the early stages of this controversy.

* The contentions which you make regarding the carrier's influence arise out of circumstances antedating the Board's investigation of this case which was begun on November 2, 1942, circumstances in respect of which the Mediation Board possesses no jurisdiction. Our power in such matters is to

the Board has no power to protect the right from acts of carrier interference which antedate a representation election, the absence of such a power in the district courts would leave the right unprotected against such pre-election interference. And it is during the period preceding an election, when the employee is making up his mind as to whom he will vote for at the election, that protection from carrier interference and influence is most needed.⁵

It may be suggested that the right would not be obliterated even if the district courts lacked the power to pro-

insure that during the time of taking a secret ballot or in exercising other methods of ascertaining the choice of representatives, the employees shall be free from interference, influence or coercion by the carrier. This, the Board can and will do within a prescribed area, if, and when, an election is being held. (R. 38-39)

And in its amended answer, the Board defended and reasserted this view:

"In answer to paragraph 44 of the complaint, these defendants deny that the said election and the certification are illegal, null and void; they deny that the Board, in not determining whether the labor practices charged to the Pennsylvania Railroad would interfere with, influence or coerce the craft or class of road conductors in their choice of a bargaining representative, was failing to perform its statutory duty;

* * * For further answer these defendants allege: That the Board determined, * * * that the instant charges did not allege carrier coercion directly affecting and occurring during the actual conduct of the election and that the Board therefore, as a matter of law, had no jurisdiction to consider the validity of these charges on the merits * * * (R. 73-74).

While the petitioners disagree with the Board's definition of its power under Section 2, Ninth, there is no denying that its definition is immune to challenge in the courts, for, as Mr. Justice Reed pointed out in his dissenting opinion, the *Switchmen's Union* decision "leaves the interpretation of the authority granted by Section 2, Ninth, finally to the Board" (326 U. S. at 311).

It has not been disputed by either of the respondents, but has been tacitly conceded by both, that Section 2, Third, may be violated by a carrier prior to the holding of a representation election.

fect it from pre-election carrier interference, because a carrier guilty of pre-election interference would be subject to the criminal penalties provided for in Section 2, Tenth. But to argue that Section 2, Tenth, will deter carriers from interfering with their employees' choice and thereby save the right from obliteration, is to ignore realities. A conviction can be secured under Section 2, Tenth, only by proving, *beyond all reasonable doubt*, that the carrier *willfully* violated its employees' right under Section 2, Third. As a practical matter, Section 2, Tenth, is no protection whatever against the more subtle forms of carrier interference and influence. Moreover, the prosecution of a carrier guilty of pre-election interference would not erase the effects of that criminal conduct and would not, therefore, insure that a free choice would be exercised at the election.⁶

It may also be suggested that even if the district courts do have the power to protect the right from acts of carrier interference antedating a representation election, that power does not permit them to grant the relief which the petitioners are seeking in this case—the annulment of the election and certification of BRT as the conductors' representative. But without such breadth, that power ordinarily would be wholly inadequate to protect the right.

Recall, for example, the alleged sequence of events in the subject case: Beginning August 3, 1942, Pennsylvania began engaging in conduct which, as Pennsylvania intended it would, influenced the craft of road conductors to believe their current representative, ORC, was a less effective bargaining agent than BRT. On September 23, 1942, BRT invoked the services of the Board to investigate a representation dispute among the road conductors. On October 28, 1942, ORC protested to the Board that an election should

⁶In *I. A. of M. v. Labor Board*, 311 U. S. 72, 82, and *Labor Board v. Link-Belt Co.*, 311 U. S. 584, 690, this Court recognized that an employer's acts may have a lasting and continuing influence upon the employees' choice of a representative.

not be held "at this time" because Pennsylvania had engaged in conduct which interfered with and influenced the conductors in their choice, and ORC offered to prove its charges. The Board on November 9, 1942, ruled that since ORC's charges related to acts of interference antedating the election, the Board had no power or duty under the Act to investigate or consider them, and could not, therefore, postpone the election. On December 3, 1942, the Board ordered an election to be held during the two weeks December 5-19. The election was held, and on December 27, 1942, the Board certified the winner, BRT, as the conductors' representative.

In these circumstances, what measures could have been taken by ORC to enforce the road conductors' right to a free choice?

ORC could have filed suit any time after August 3, 1942, when Pennsylvania first interfered, to enjoin Pennsylvania from committing any further acts of interference. However, an injunction against future interference would not have eliminated the effects of the prior interference and would not, therefore, have insured that the conductors would be able to exercise a free choice at the coming election.

It is clear that ORC could not have maintained a suit against the Board to have the election postponed, because the courts will not interfere with the Board in the exercise of its functions under Section 2, Ninth. The District Court of the United States for the District of Columbia invariably has declined to direct that a representation election be postponed, and it seems clear from *the Switchmen's Union* decision that the courts cannot dictate to the Board how it shall perform its duties.

Perhaps ORC could have had Pennsylvania prosecuted, but, as hereinabove explained, Section 2, Tenth, imposes a

⁷ It appears from its language, however, that Section 2, Tenth, will be invoked only upon application to a district attorney by the "duly designated representative." As that term is used in the Act, it refers to *certified* representatives, and ORC was never the *certified* representative of the road conductors.

difficult burden of proof upon the prosecution, and a conviction, even if obtained, would not have righted the wrong or insured that the conductors would be able to exercise a free choice at the election.

It develops, therefore, that the district Court's power to enforce the right (even when supplemented by criminal sanctions) would be wholly inadequate unless that power is sufficiently broad to permit the court to set aside the election and certification. The annulment of the election and certification would effectively enforce the right, as it would render unsuccessful Pennsylvania's attempt to induce the road conductors to transfer their representation from ORC to BRT; it would release the road conductors from a choice which was not a free choice, and it would disenable BRT to reap the fruits of Pennsylvania's illegal conduct.

It appearing that the annulment of the election and certification of BRT as the conductors' representative is the only relief that will effectively vindicate the conductors' right to a free choice, it is clear that the district court has the power to annul that election and certification. The reason why the district court has the power under Section 24(c) of the Judicial Code to entertain the petitioners' suit to enforce the right to a free choice, is because the lack of such a power would result in the obliteration of that right. This assumes that if the court has the power, it can prevent the obliteration of that right. It follows that the court has the power to annul the election and certification if annulment is necessary to prevent the obliteration of that right.

CONCLUSION.

It is submitted that the judgment of the Court of Appeals should be reversed and the cause remanded to that Court with instructions to enter a judgment reversing the judgment of the district court dismissing the amended complaint for failure to state a cause of action.

Respectfully submitted,

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APPENDIX.

The pertinent provisions of the Railway Labor Act of 1926, 45 Stat. 577, as amended in 1934, 48 Stat. 1185, 45 U. S. C., Sec. 151, *et seq.*, read as follows:

"Section 2. * * *

"Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions. *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during work.

ing hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representatives so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than \$1,000 nor

more than \$20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

No. 200.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1944.

ORDER OF RAILWAY CONDUCTORS OF AMERICA; H. W. FRASER
AS PRESIDENT OF THE ORDER OF RAILWAY CONDUCTORS OF
AMERICA, ET AL., *Petitioners*,

v.

THE PENNSYLVANIA RAILROAD COMPANY AND BROTHERHOOD OF
RAILROAD TRAINMEN.

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia.

REPLY BRIEF FOR PETITIONERS.

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ARGUMENT.

The respondents, in urging the affirmance of the Court of Appeals' judgment, have advanced several arguments to which the petitioners reply as follows:

THE SWITCHMEN'S UNION DECISION.

Pennsylvania has argued that this Court's decision in *Switchmen's Union v. Board*, 320 U. S. 297, "correctly analyzed," is controlling here because the petitioners' suit attacks a certificate issued by the Board and for the additional reason that the Board is not present to defend its certification. (Penna. br. 16-24) The petitioners' argument to the contrary is said to be "fatally defective" because it "misconstrues" the *Switchmen's Union* case. (Penna. br. 32-38)

Pennsylvania's argument that the *Switchmen's Union* decision governs the instant case rests upon the premise that the Board considered the charges of carrier interference and influence set forth in ORC's October 28, 1942, letter of protest and determined those charges to be groundless.

1. Pennsylvania explains that "the actual decision of this Court in the *Switchmen's Union* case" was

"that a certification issued by the Board represents a final, conclusive and unreviewable determination with respect to the representation dispute for which it is issued; and that any such representations dispute between rival labor organizations which culminates in such a certification is thereby finally disposed of and cannot thereafter be the subject of consideration in a judicial proceeding." (Penna. br. 35)

2. Pennsylvania's argument that the *Switchmen's Union* decision governs this case proceeds substantially as follows:

1. The Board considered ORC's charges that Pennsylvania had interfered with, and influenced the conductors in their choice of a representative, and determined that those charges were invalid. (Penna. br. 9-10, 13, 19-20, 34, 38-42) That the Board did consider those charges and did determine them to be groundless, is said to be conclusively evidenced by "The Action of the Board" (in refusing to postpone the election and in certifying the winner of the election) and by "The Statements of the Board" (appearing in its reply to ORC's letter of protest, in its original and amended answers and in its brief below. (Penna. br. 38-42)

2. The charges of carrier interference and influence contained in the petitioners' amended complaint are the same as

The petitioners' argument that the *Switchmen's Union* decision is not controlling here, on the other hand, rests upon the premise that the Board, ruling that it has no power with respect to carrier interference antedating a representation election, did not consider ORC's charges of carrier interference.

It develops therefore, that a decisive issue in the present case is whether the Board did or did not consider ORC's charges of carrier interference. The following re-examination of all facts of record pertaining to this issue seems to be in order.

(a) Attached to the amended complaint as Exhibit "G" and appearing in the printed record at R. 23-33, is a copy of the October 28, 1942, letter wherein ORC protested to the Board that a representation election should not be held among the road conductors "at this time" for the reason, among others, that certain conduct on the part of Pennsylvania had interfered with and influenced the conductors in their choice of a representative. Also attached to the amended complaint as Exhibit "H" and appearing in the printed record at R. 33-40, is a copy of the Board's November 9, 1942, reply to ORC's letter of protest.

To the full extent it pertains to the charges of carrier interference and influence set forth in ORC's letter of protest, the Board's reply reads:

"In your letter the position of the Order of Railway Conductors is set forth under six separate counts,

the charges which were set forth in ORC's letter of protest; hence, the petitioners' suit calls upon the court to decide the same question as was decided by the Board—the question whether those charges are valid—and, in the event it determines those charges were valid, to set aside the certificate issued by the Board. (Penna. br. 13, 19-29, 38)

3. Therefore, the petitioners' suit asks for court review of the action taken by the Board in issuing a certificate. (Penna. br. 13, 23, 32, 37-38)

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which for clarity we have further divided and summarized as follows:

3. An election at this time could not be said to be one without interference, influence or coercion exercised by the carrier.

4. (b) The management has been and is now attempting to coerce the Order of Railway Conductors committee into an acceptance of rules and working conditions contrary to long-established practice by directly and indirectly implying that the Order of Railway Conductors should agree upon a revised schedule before an election is held.

5. (a) The record clearly demonstrates some understanding, express or implied, between the carrier and the Brotherhood of Railroad Trainmen in an attempt to terminate representation of conductors by the Order of Railway Conductors on the Pennsylvania Railroad.

The above points are susceptible, we believe, to appropriate groupings for the purpose of consideration and discussion, and they are therefore being referred to under the three following general headings:

Nos. 2, 3(b) and 6(a) — *These items deal with alleged activity of the carrier designed to influence employees in their choice of representatives, which action is prohibited by Section 2, Third, of the Act. For convenience that part of the law here referred to is quoted as follows:*

Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence or coerce the other in its choice of representatives.

"The contentions which you make regarding the carrier's influence arise out of circumstances antedating the Board's investigation of this case which was begun on November 2, 1942, circumstances in respect of which the Mediation Board possesses no jurisdiction. Our power in such matters is to insure that during the time of taking a secret ballot or in exercising other methods of ascertaining the choice of representatives, the employees shall be free from interference, influence, or coercion by the carrier. This, the Board can and will do within a prescribed area if, and when, an election is being held.

"In this comment on carrier influence, it seems unnecessary to do more than point out to you that the Railway Labor Act prescribes an exclusive procedure for the protection of employees in the choice of representatives. The provisions of Section 3 as quoted above may be made effective through the application of Section 10 of the Act.³

"This leaves for final consideration your willingness to present further evidence in support of your statements and your request that you be afforded an opportunity to be heard. If you have in mind a formal hearing at which the interested parties would be present, we find nothing in the matters alleged in your protest which falls within the purview of a formal hearing customarily held in connection with representation disputes. As you know, hearing held by the Board under Section 2, Ninth, of the law has been for the purpose of determining who shall participate in an election.

"We shall be pleased, of course, to discuss orally with you or your representatives, if you wish, the basis upon which the Board has reached the conclusions stated herein, and we shall be glad to have you call at

³ In their amended answer, the Board and its members acknowledged that the district court "has jurisdiction to consider the validity of these charges on the merits on evidence *de novo*." (R. 74). This indicates the above paragraph in the Board's letter was intended to mean merely that the sole provisions in the Railway Labor Act empowering a district court to entertain a suit to enforce Section 2, Third, are those in Section 2, Tenth, and was not intended to mean that a suit to enforce Section 2, Third, cannot be entertained by a district court in the exercise of the power vested in it by the provisions of Section 24 (8) of the Judicial Code.

our office for this purpose any time you are in Washington.

In the above discussion we have dealt specifically with the issues raised by your protest as well as with your request for a hearing and we have pointed out the reasons why the Board is duty bound under the law to accept and act upon the Brotherhood's application. We have also shown why the Board cannot deal with the other matters presented by you. We do not find in your submission reference to any provisions of the Railway Labor Act under which your protest may be legally granted, nor does the Board, itself, find any such provisions. Therefore, we conclude we have no alternative but to continue the investigation of this case which was commenced at Philadelphia, November 2, and the mediator in charge of the investigation has been advised accordingly. (Italics supplied)

The petitioners submit the above excerpts from the Board's November 9, 1942, reply to ORC's letter of protest disclose (1) that the Board refused to investigate or consider ORC's charges of carrier interference, (2) that the Board's refusal was predicated upon the fact that those charges related to carrier conduct which had occurred prior to November 2, 1942, when the Board instituted its investigation of the representation dispute, and (3) that the Board stated its power under the Act with respect to carrier interference is limited to carrier interference which occurs during the progress of a representation election and does not extend to carrier interference antedating a representation election.

(b) The allegations that Pennsylvania engaged in certain conduct which interfered with and influenced the conductors in their choice of a representative, appear in paragraphs 14 through 33 of the amended complaint. (R. 6-17) In paragraphs 5 and 7 of their answer to this amended complaint the Board and its members state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 14 through 33 of the amended complaint. (R. 60 and 61)

Pennsylvania has said that the charges of carrier interference and influence set forth in ORC's October 28, 1942, letter of protest "are the same charges as those now contained in the present complaint." (Penna. br. 38). This being true, the declaration by the Board and its members that they are "without knowledge or information sufficient to form a belief as to the truth" of those charges, seems to contradict Pennsylvania's assertion that the Board gave "extended consideration" to ORC's charges. (Penna. br. 38).

In paragraph 37 of the amended complaint it is alleged that ORC's letter of protest (Exhibit "G") charged that Pennsylvania had interfered with and influenced the conductors' choice of a representative (R. 17-18), and in paragraph 40 it is alleged that in its reply (Exhibit "H") the Board refused to consider those charges and based its refusal on the ground that its power under the Act with respect to carrier interference and influence is limited to carrier interference which occurs during the time an election is in progress and within a prescribed geographical area (R. 18). In answer to these allegations the Board and its members stated merely that "said Exhibits 'G' and 'H' speak for themselves" (R. 62).

In paragraphs 41 and 42 of the amended complaint it is alleged that the Board did have the power and duty under the Act to consider ORC's charges of carrier interference, to determine the validity of those charges and in the event it determined the charges valid, to postpone the holding of a representation election among the conductors until such time as it should decide that carrier interference had ceased; and that the Board acted wrongfully and illegally in refusing to consider those charges and insure the conductors a free choice. (R. 18-19). In paragraph 11 of their amended answer the Board and its members categorically "deny the allegations contained in paragraphs 41 and 42 of the complaint." (R. 73).

It is apparent from the foregoing that the Board based and defended its refusal to consider ORC's charges of carrier interference on the ground that it has no power or duty under the Railway Labor Act with respect to carrier interference antedating a representation election.

(d) In paragraph 44 of the amended complaint it is contended that the election and certification of BRT as the conductors' representative should be set aside for either one or both of two reasons: First, because the Board failed and refused to perform its duty under the Act when it declined to consider ORC's charges of carrier interference, and, Secondly, because Pennsylvania in fact interfered with and influenced the conductors in their choice of a representative. (R. 19-20)

In paragraph 13 of their amended answer the Board and its members stated:

"In answer to paragraph 44 of the complaint, these defendants deny that the said election and the certification are illegal, null and void; they deny that the Board, in not determining whether the labor practices charged to the Pennsylvania Railroad would interfere with, influence or coerce the craft or class of road conductors in their choice of a bargaining representative, was failing to perform its statutory duty; they deny that the practices complained of constitute in fact unlawful coercion. For further answer these defendants allege: That the Board determined on the basis of the facts furnished by plaintiff Order of Railway Conductors, but without a hearing, that the instant charges did not allege carrier coercion directly affecting and occurring during the actual conduct of the election and that the Board therefore, as a matter of law, had no jurisdiction to consider the validity of these charges on the merits; that the Board was not required by the Constitution or the Railway Labor Act to hold a hearing to make such a determination; that this Court has jurisdiction to consider the validity of these charges on the merits on evidence de novo; that in view of the fact that the Board has not passed upon and is not authorized to pass upon the validity of these charges on the merits, these de-

pendants will stand neutral before this Court with respect to such issues." (R. 73-74) (Italics supplied)

Petitioners submit it is plainly evident from the above-quoted paragraph 13 of the Board's amended answer (1) that the Board did not investigate or consider ORC charges of carrier interference, (2) that the Board did not determine whether those charges were valid—that the Board did *not* determine the conduct charged would have "no bearing or effect on the election," (3) that the Board based and defended its refusal to consider those charges and to determine their validity on the ground that they related to circumstances antedating the holding of a representation election among the conductors and (4) that the Board held it has no power under the Act with respect to carrier interference antedating a representation election but has power only with respect to carrier interference which occurs during the time an election is in progress.

The conclusions which the petitioners have drawn from the foregoing portions of the record are not contradicted by the fact that in paragraph 13 of their amended answer the Board and its members "deny that the practices complained of constitute in fact unlawful coercion." (R. 74) That fact indicates merely that when, on May 11, 1943, the Board and its members answered paragraph 44 of the amended complaint, they alleged as one defense to the suit that the petitioners had not charged Pennsylvania with unlawful conduct—in other words, that the petitioners had not stated a cause of action. It does not even suggest, much less establish, that prior to January 7, 1943, when the petitioners amended their complaint and added paragraph 44 thereto, the Board had considered the charges of carrier interference set forth in ORC's letter of protest and determined the charges groundless; indeed, the italicized sentences in paragraph 13 of the amended answer establish beyond doubt that the Board did not consider or determine the validity of those charges before holding a representation

election among the conductors and certifying the winner of that election as the conductors' representative.

Nor are the conclusions which the petitioners have drawn from the foregoing portions of the record contradicted by the fact that in their brief below the Board and its members advanced the following argument:

"We prefer, however, to support the Board's decision that it lacked authority to investigate, hear, and determine these charges on a somewhat broader ground, a ground admittedly not the one mentioned in the Board's letter. * * * The ground for affirmance which we now advance is that the Board's duty is only to investigate whether employee representatives are designated and authorized without carrier coercion, and not to investigate whether other provisions of Section 2 not relating to designation and authorization of representatives have been violated. And we shall show that the charges of carrier coercion made to the Board on behalf of O.R.C. did not, even if accepted as true, relate to designation of employee representatives, and were thus not such as the Board was required to investigate in order to ascertain if they were well-founded." (Penn. Appendix 6(a))

This argument acknowledges that the Board did not consider or determine the validity of O.R.C.'s charges, and is explained as being advanced to support the contention that the Board's refusal to consider and to determine the validity of O.R.C.'s charges did not invalidate the election and certification.

The petitioners, therefore, respectfully submit that the factual premise upon which Pennsylvania's argument respecting the *Switchmen's Union* decision is rested, is entirely false.

BRT has summarized its argument that the *Switchmen's Union* decision is conclusive authority that the federal courts have no power to entertain the instant suit, as follows:

"There is little if any distinction in the proposition urged in the case at issue and the *Switchmen's* case

where the Board ruled that it had *no discretion to split a carrier* for the purpose of recognizing groups who had bargained under one contract for a long period of years as a separate class or craft, and the present case where the Board ruled it had no *jurisdiction* to consider coercion ante-dating the actual holding of an election. Since this Court in the *Switchmen's* case considered that the right was given under Section 2, Fourth, to have designated the appropriate crafts or class, incident to who might participate in an election under this section, and if it considered that the Board failed to exercise its duty on the theory that if had no jurisdiction to split a carrier this Court, should the petitioners' theory be correct, would have permitted the Federal Court to have considered the right given by Section 2, Fourth." (BRT br. 13-14)

Apparently this means that, in accordance with the *Switchmen's Union* decision, this Court will not consider or decide whether the Board is correct in the view that its power under Section 2, Ninth, with respect to carrier interference is limited to carrier interference which occurs during the progress of an election. If this is what BRT means, petitioners agree. They acknowledge that the Board's definition of its power under Section 2, Ninth, is not subject to challenge in the courts. (See Note 4, p. 27 of the petitioners' brief on the merits.)

II.

SECTION 2, TENTH.

Pennsylvania has advanced the argument that "the present suit must fail because it is not brought under the provisions of Section 2, Tenth." (Penna. br. 24) It is Pennsylvania's position that Section 2, Tenth, provides the exclusive method of judicial enforcement of the right guaranteed by Section 2, Third (Penna. br. 24-32), and that Section 2, Tenth, furnishes complete and adequate protection for that right (Penna. br. 42-45). In support of this position Pennsylvania asserts that the legislative history

of the 1934 amendments to the Railway Labor Act, as well as certain "practical considerations," indicate that Section 2, Tenth, (which is said to authorize United States district attorneys to institute both civil and criminal proceedings to enforce Section 2, Third), was intended to provide the exclusive method of judicial enforcement of Section 2, Third (Penna. br. 34-32), and that the remedy available to employees under Section 2, Tenth, for the enforcement of their right to freedom of choice is complete and adequate (Penna. br. 42-45).

The petitioners cannot agree with Pennsylvania's contention that Section 2, Tenth, authorizes the institution of civil proceedings to enforce Section 2, Third. To the petitioners' knowledge, it never before has been suggested that paragraph Tenth empowers United States district attorneys to inaugurate proceedings other than criminal proceedings to enforce the provisions of that paragraph.

The "practical considerations" which are urged by Pennsylvania as supporting its view that Section 2, Tenth, provides the exclusive method of judicial enforcement of Section 2, Third, are that railway employees and railway labor unions are irresponsible and cannot be trusted with the power to enforce their rights under the Railway Labor Act. It is said that if they should have the power to institute suits to enforce such rights the dockets of the courts would be crowded and railroads would be harrassed by suits having no foundation in fact, but filed by unions and employees solely out of their dissatisfaction with the outcome of representation elections.

At page 37 of its brief Pennsylvania says, with reference to the instant case:

"If the exclusive procedure specified by Congress had been followed in the present case, it is probable that this dispute would never have reached a district court, and certainly not this Court."

This statement prompts the petitioners to observe that if Pennsylvania was so completely confident that the instant suit is without foundation, it is strange that Pennsylvania has so strenuously opposed permitting the case to come to trial. The petitioners withhold making any observation, however, with respect to the clear implication of the above statement that this Court exercised something less than wisdom in granting the petition for certiorari in this case.

Paragraph Tenth defines as a crime the "willful failure or refusal of any carrier, its officers or agents to comply with the terms of the Third, Fourth, Fifth, or Eighth paragraph of this section." It provides that upon being convicted of this crime a carrier, officer or agent shall be subject to fine or imprisonment, or both, and it provides that

It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States; *all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.*"

Pennsylvania relies upon the above italicized clause in contending that Section 2, Tenth, "is not limited to criminal proceedings to punish violations of the rights specified, but also clearly contemplates affirmative judicial action in other types of proceedings, legal and equitable, brought by United States attorneys to prevent violations of Section 2 and to rectify conditions resulting from such violations." (Penna. br. 25) If, as Pennsylvania says, civil proceedings are authorized by this clause, it will be noted that such proceedings may be brought not merely to enforce compliance with "the Third, Fourth, Fifth, Seventh and Eighth paragraphs of this section," but to enforce *all the paragraphs* of Section 2. If this is true and if it also is true, as Pennsylvania says, that Section 2, Tenth, provides the exclusive method of judicial enforcement of the rights under Section 2, it follows that this Court erred when it held in the *Virginian Railway* case (*Virginian Ry. v. Federation*, 300 U. S. 515) that federal courts may entertain suits brought by a certified representative (and not by a district attorney) to enforce the "treat with" requirement in Section 2, Ninth.

The petitioners submit that if Congress had intended to authorize district attorneys to institute civil proceedings to enforce *all rights, duties and prohibitions* under Section 2, it would have done so in clear, unmistakable language. The petitioners believe the assumption is unwarranted that Congress intended so to provide in a clause which is of obscure meaning and is buried in a statutory provision which defines as a crime the willful failure or refusal to comply with only particular duties and prohibitions under Section 2. The true meaning and purpose of that clause, the petitioners believe, should be gathered from the context; they believe it means merely that district attorneys may institute proceedings which are ancillary but necessary to the successful prosecution of criminal proceedings.

The petitioners have carefully examined the committee hearings, the majority and minority reports, and the Congressional debates on the 1934 amendments, but have found not a single intimation that Section 2, Tenth, was intended to authorize district attorneys to institute civil proceedings for the enforcement of the rights created by Section 2. On the contrary, whenever the paragraph was referred to it was identified as a "penalty paragraph" or by the "penalties" which it provided. See S. Rep. No. 1065, 73rd Cong., 2d Sess., p. 2; Hearings, Senate Committee on Interstate Commerce, 73rd Cong., 2d Sess., on S. 3266, pp. 14, 151, 152; Hearings, House Committee on Interstate and Foreign Commerce, 73rd Cong., 2d Sess., on H. R. 7650, pp. 28, 38, 133, 134.

Section 3, Tenth, was referred to by this Court in the *Virginian Railway* case as follows (300 U. S. at 545, N. 3):

"The 1934 amendments imposed various other obligations upon the carrier, to which criminal penalties were attached . . ."

It was referred to by this Court in the *M-K-T* case (*General Committee v. M-K-T, R. Co.*, 320 U. S. 323, 328, N. 6), and in the dissenting opinion in the *Switchmen's Union* case.

(320 U. S. 297, N. 15), in substantially the same manner. Nor can the petitioners agree with Pennsylvania's contention that Section 2, Tenth, provides an exclusive method for judicially enforcing Section 2, Third. Indeed, this Court has long since determined the contrary to be the case.

This Court held in the *Railway Clerks* case (*Texas & N. O. R. Co. v. Railway Clerks*, 281 U. S. 548) that the federal courts had the power to entertain a suit brought by a labor union to enforce the right guaranteed to employees by Section 2, Third, of the Railway Labor Act of 1926.

Pennsylvania says that when Congress amended the Railway Labor Act in 1934, it in effect "reversed" the *Railway Clerks* decision (Penn. br. 43-44). But in the *Virginian Railway* case, which involved the Railway Labor Act as amended in 1934, this Court stated (300 U. S. at 543-544):

"It [Congress] recognized their right to designate representatives for the purposes of the Act without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other." Section 2, Third, 44 Stat. 577. Under the last-mentioned provision this Court held, in the *Railway Clerks* Case, *supra*, that employees were free to organize and to make choice of their representatives without the "coercive interference" and "pressure" of a company union organized and maintained by the employer; and that the statute protected the freedom of choice of representatives, which was an essential of the statutory scheme, with a legal sanction which it was the duty of courts to enforce by appropriate decree.

"The prohibition against such interference was continued and made more explicit by the amendment of 1934. Petitioner does not challenge that part of the decree which enjoins any interference by it with the free choice of representatives by its employees, and the fostering, in the circumstances of this case, of the company union. That contention is not open to it in view of our decision in the *Railway Clerks* Case, *supra*, and of the unambiguous language of section 2, Third, and Fourth, of the act, as amended."

This statement clearly indicates that in the judgment of this Court the holding in the *Railway Clerks* case was not relegated to limbo by the 1934 amendments to the Act.

Pennsylvania contends, however, that when, in the *Virginian Railway* case, this Court made the above statements respecting the *Railway Clerks* case, it

"did not have in mind the considerations which it has spelled out in the *Switchmen's Union* case, nor did it have in mind the fact that Section 2, Tenth, added to the Act after the decision in the *Clerks* case, had provided a specific method for judicial protection of the right to freedom from coercion * * * (Penn. br. 45)

The petitioners are not inclined to agree that this Court did not know what it was talking about when it made the above statements. One of the problems with which this Court was concerned in the *Virginian Railway* case was the same problem presented by the *Switchmen's Union* case, "the nature and extent of the relief which courts are authorized by the Act to give" (300 U. S. at 538), and that this Court was aware of the nature and existence of Section 2, Tenth, is evident from the fact that the Court referred to and summarized that paragraph (300 U. S. at 548, N. 3).

Pennsylvania also asserts the above statements in the *Virginian Railway* decision have no application here because "the acts of coercion and interference alleged in that case occurred *after* the Mediation Board had certified the union as the representative of the employees." (Penn. br. 44). This assertion also is false. The district court's decree enjoining the Virginian Railway from interfering with its employees' choice of representatives was based on findings of fact which the district court summarized as follows (11 F. Supp. 621, 633):

"This unlawful interference and purpose to influence its employees has been evidenced chiefly through activities of the Railway in creating and promoting so-called independent organizations, both before and since the

election, and by its fixed determination not to recognize or treat with the chosen representatives of the crafts unless they came from an organization under its control." (Italics supplied)

This summary by the district court of its findings was adopted and quoted by the Fourth Circuit Court of Appeals when it affirmed the district court's decree (84 F. 2d, 641, 644), and this Court accepted "the current findings of fact of the two courts below" (300 U. S. at 542).

That this Court is of the opinion the *Railway Clerks* decision was not affected by the 1934 amendments to the Act is further apparent from its remarks respecting that decision in the *Switchmen's Union* case (320 U. S. at 300), in the *M-K-T* case (320 U. S. at 327, 329), and in *Stark v. Harkard* (321 U. S. 288, 306-307). In those cases this Court acknowledged that the right of action recognized in the *Railway Clerks* decision is an exception to the doctrine of the *Switchmen's Union*, *M-K-T* and *Southern Pacific* decisions. Pennsylvania is, in effect, insisting to this Court that it should broaden the sweep of that doctrine by abolishing the exception recognized in the decision's enunciating it.

Moreover, in view of the fact the *Railway Clerks* and *Virginian Railway* decisions were based on the principle that the federal courts will enforce rights created by the Railway Labor Act where necessary to save those rights from sacrifice (*Switchmen's Union v. Board*, 320 U. S. at 300), it is apparent that Section 2, Tenth, does not, in the judgment of this Court, furnish complete and adequate protection for the right guaranteed by Section 2, Third.

The extract from the report of the Senate committee on the 1934 amendments to the Railway Labor Act set forth in Pennsylvania's brief to support the assertion that Section 2, Tenth, furnishes an exclusive remedy (Penna. br. 28), in no way suggests that this penalty provision is intended to furnish the exclusive method for judicially enforcing the prohibitions and duties created by Section 2. With respect to the extracts from Mr. Eastman's testi-

mony before the Senate and House committees set forth in Pennsylvania's brief for the same purpose (Penna. br. 26-28), the petitioners believe that other portions of Mr. Eastman's testimony indicate that he did not mean Section 2, Tenth, would prescribe the exclusive method of judicial enforcement of the right guaranteed by Section 2, Third, but meant merely that the *only provisions in the Railway Labor Act* for the enforcement of the rights guaranteed in Section 2 were those in the proposed paragraph Tenth. In the course of his testimony before the Senate committee Mr. Eastman acknowledged that under the *Railway Clerks* decision a power obtains in the federal courts to entertain equity proceedings brought to enforce the right created by Section 2, Third, and urged that "the penalty paragraph," if adopted, would serve as an effective deterrent to violations of the duty created by Section 2, Third, and thereby complement and strengthen the existing remedy. (Hearings, Senate Committee on Interstate Commerce, 73rd Cong., 2d Sess., on S. 3266, pp. 151, 152.)

III.

THE M-K-T AND SOUTHERN PACIFIC DECISIONS.

The respondents argue that the charges of carrier interference set forth in the amended complaint are based entirely upon alleged violations of ORC's jurisdiction as the conductors' representative and that a decision whether Pennsylvania did interfere with the conductors' choice in the manner charged would necessitate a determination of the scope of ORC's jurisdiction as the conductors' representative—a determination which, according to this Court's decisions in the *M-K-T* and *Southern Pacific* cases, the federal courts have no power to make. (Penna. br. 45-62; M-K-T br. 18-23)

The petitioners anticipated and dealt with this argument at pages 14-21 of their brief on the merits. As there explained (pp. 15-16), the initial reason why the *M-K-T* and

Southern Pacific decisions do not govern here is that the charges of carrier interference set forth in the amended complaint are *not* based entirely upon alleged violations of ORC's jurisdiction as the road conductors' representative; the amended complaint contains several allegations charging that Pennsylvania interfered with the conductors' choice in other ways than by violating their representatives' bargaining jurisdiction.

Pennsylvania endeavors to dispose of this point by arguing that all the alleged acts relied upon by the petitioners as not involving a jurisdictional question are "integral phases" of the jurisdictional dispute. (Penna. br. 51-54) The petitioners are unable to see where this argument leads. Assume, *arguendo*, that "all the charges in the complaint against the Railroad [do] relate to the jurisdictional dispute" (Penna. br. 54).. Certainly the *M-K-T* and *Southern Pacific* decisions do not preclude a court from determining the validity of those charges if such a determination will not require the court to define the disputants' jurisdictional rights.

As explained in the petitioners' brief on the merits (pp. 16-19), the second reason why the *M-K-T* and *Southern Pacific* decisions do not govern here is that, although the petitioners' suit is based in part upon allegations of conduct by Pennsylvania which is asserted to have violated both the road conductors' right to a free choice and ORC's jurisdiction as the road conductors' bargaining agent, a decision whether such conduct did interfere with and influence the conductors' choice will not necessitate a determination whether it also violated ORC's jurisdiction as the road conductors' representative.

Pennsylvania endeavors to dispose of this point on two grounds, the first of which is explained in the following statement:

"But it is plain, under the Railway Labor Act, that the making of a collective bargaining agreement between a railroad and one labor organization cannot, of itself,

constitute the basis for a charge of interference and coercion by the railroad of a class of employees represented by another labor organization, unless it is also shown that the agreement is in some way unlawful and violative of the legal rights of such employees or of such labor organization." (Penna. br. 58)

What Pennsylvania overlooks is the fact that if it is proved the "making of a collective bargaining agreement between a railroad and one labor organization" interfered with the employee's choice of a representative, it is proved that the making of the agreement "was violative of the legal rights of such employees" under Section 2, Third.

Pennsylvania also endeavors to dispose of this point on the ground that none of the acts charged to Pennsylvania in the amended complaint interfered with, influenced or coerced the conductors' choice of a representative. (Penna. br. 49-51)⁵

In reply, the petitioners would point out that the question whether conduct on the part of a carrier interferes with, influences or coerces its employees in their choice of representatives, is a question of fact. See *Texas & N. O. R. Co. v. Ry. Clerks*, 281 U. S. at 558-560; *Virginian Ry. v. Federation*, 300 U. S. at 542. This being so, Pennsylvania's opinion as to whether it interfered with and influenced the conductors in their choice of a representative carries no great weight.⁶

⁵ It is interesting to compare the views expressed by Pennsylvania in its brief as to what constitutes "influence" with the views expressed on the same subject by Mr. M. W. Clement, President of the Pennsylvania Railroad Company, at the hearings before the House and Senate committees on the 1934 amendments to the Railway Labor Act (Hearings, House Committee on Interstate and Foreign Commerce, 73rd Cong., 2d Sess., on H. R. 7650, pp. 128-130, 133-134; Hearings, Senate Committee on Interstate Commerce, 73rd Congress, 2d Sess., on S. 3266, pp. 60-61, 65-66, 76-77).

⁶ That the Court of Appeals believed that the acts charged to Pennsylvania in ORC's letter of protest would, if true, have interfered with and influenced the conductors in their choice of a representative, is clear from the following statements in its opinion:

In any event, the question whether Pennsylvania in fact interfered with and influenced the road conductors' choice is not before this court. The only inquiry to be made in that connection here is whether, under the allegations set forth in the amended complaint, the petitioners on the trial of this case could introduce proof of facts on the part of Pennsylvania which could be found to have interfered with and influenced the conductors' choice. This Court necessarily will consider that question in deciding whether the federal courts have power to entertain this petitioners' suit.

IV.

THE BOARD AS A PARTY.

Pennsylvania argues that the "petitioners' failure to name the Board as a respondent in this Court" makes it "impossible for this Court to grant the relief sought in this proceeding." (Penna. br. 62-66)

In the last analysis, the basis of this argument is that the present suit calls upon the courts to review the Board's action in certifying BRT as the conductors' representa-

In the present case Conductors had, prior to this controversy, represented road conductors, and Trainmen had represented yard conductors. When the right of the former to continue to represent road conductors was challenged by Trainmen and it was charged that there was collusion between Trainmen and the Railroad, with the purpose of influencing the electors in casting their ballots, we think the Board should have investigated the charge before calling or holding an election. This seems to us to follow from [fol. 115] the provisions of the Section of the Act under which the Board is required to function. The Board's justification that jurisdiction to police the election was confined to the event itself, and not the circumstances leading up to it, does not appeal to us. See *Texas & N. O. R. R. Co. v. Brotherhood, &c.*, 281 U. S. 548 (141 F. 2d, 366, 367, R. 115)

Pennsylvania concedes that the allegations set forth in the amended complaint are the same as those set forth in ORC's letter of protest. (Penna. br. 38)

five. But such is not the case. The petitioners are not contending that the Board either failed to perform or improperly performed its duties and powers under the Act in issuing the certificate naming BRT as the conductors' representative. Therefore, the annulment of that certification will in no sense constitute a judicial admonishment of the Board for issuing that certificate. And since it is not the Board's province to enforce its certificates, the annulment of the certificate in this case will not thwart the Board in the exercise of any of its functions.

CONCLUSION.

For the reasons set forth in the petitioners' brief on the merits, it is respectfully submitted that the Court of Appeals erred in dismissing the instant case for lack of jurisdiction.

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There is no essential difference between the argument advanced at pages 62-66 of Pennsylvania's brief and the argument made at pages 22-24 thereof.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1944.

No 200.

ORDER OF RAILWAY CONDUCTORS OF AMERICA, et al.,
Petitioners,

v.

THE PENNSYLVANIA RAILROAD COMPANY, AND
BROTHERHOOD OF RAILROAD TRAINMEN,
Respondents.

BRIEF ON BEHALF OF RESPONDENT, THE PENNSYLVANIA
RAILROAD COMPANY, IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI.

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Supreme Court of the United States.

OCTOBER TERM, 1944.

No. 200.

ORDER OF RAILWAY CONDUCTORS OF AMERICA; H. W. FRASER
AS PRESIDENT OF THE ORDER OF RAILWAY CONDUCTORS
OF AMERICA, ETC., ET AL., *Petitioners*,

v.

THE PENNSYLVANIA RAILROAD COMPANY AND BROTHERHOOD
OF RAILROAD TRAINMEN, *Respondents*.

BRIEF ~~ON BEHALF~~ OF RESPONDENT, THE PENN-
SYLVANIA RAILROAD COMPANY, IN OPPOSI-
TION TO PETITION FOR A WRIT OF
CERTIORARI.

OPINION BELOW.

The opinion of the Court of Appeals for the District
of Columbia is reported in 141 F. (2d) 366.

JURISDICTION.

The petitioners invoke the jurisdiction of this Court under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 347(a)).

STATUTE INVOLVED.

The statute here involved is the Railway Labor Act, as amended by the Act of June 21, 1934 (45 U. S. C. Sec. 151, *et seq.*). Section 2, first, second, third, fourth, ninth and tenth, the paragraphs specially involved, are set forth in the Appendix to this brief.

STATEMENT.

The respondent, The Pennsylvania Railroad Company, opposes the petition for certiorari, and respectfully submits to this Court that the transcript of record filed in support of the petition discloses no ground for the issuance of the writ. In order more clearly to present the issues raised by the petition, respondent desires to present a restatement of the case in a form shorter and more concise than that contained in the petition.

On November 27, 1942, the petitioners, the Order of Railway Conductors (hereinafter sometimes referred to as the "Conductors"), filed their complaint in the District Court of the United States for the District of Columbia against The Pennsylvania Railroad Company (hereinafter referred to as the "Railroad"), and the Brotherhood of Railroad Trainmen (hereinafter referred to as the "Trainmen"). The complaint was later amended to include the National Mediation Board (hereinafter referred to as the "Board") as an additional defendant. The amended complaint alleged that the Railroad and the Trainmen joined in a course of action designed to influence and coerce the class of road conductors on the

©Pennsylvania Railroad in their choice of a representative (R. 14-17); that the Conductors brought this matter to the attention of the Board (R. 17, 23-33), but that thereafter the Board held a representation election among the class of road conductors without investigating the Conductors' charges of influence and coercion and, on the basis of a majority vote of the road conductors, certified the Trainmen as the designated and authorized representative of that class (R. 17-19).

As alleged in the amended complaint, the coercion and interference on the part of the Railroad consisted of encroachments upon the "jurisdictional province and representative rights" (R. 15) of Conductors as the bargaining representative of the class of road conductors on the Pennsylvania Railroad (R. 6-17). These encroachments were alleged to have been accomplished by the action of the Railroad in agreeing with the Trainmen as to rates of pay and working conditions of employees for whom the Conductors claimed to possess exclusive bargaining rights (R. 6-13), in publicizing the fact of that agreement (R. 15), in making settlement of certain time claims with the Trainmen on the basis of that agreement (R. 15), in refusing to restore to Conductors their asserted jurisdictional rights (R. 16), and in taking advantage of the said agreement with Trainmen for the purpose of saving money (R. 16-17).

The relief prayed for in the amended complaint was that the election be vacated and set aside (R. 20) and that the Railroad be ordered to negotiate with the Conductors with respect to the working conditions of the class of road conductors, and be enjoined from coercing and interfering with the class of road conductors in their choice of a representative (R. 22).

The District Court of the United States for the District of Columbia dismissed the amended complaint for failure to state a cause of action (R. 89).

The Conductors then appealed to the United States Court of Appeals for the District of Columbia (R. 90). Each of the appellees on that appeal filed a motion to dismiss the appeal for lack of jurisdiction in the court to consider the issues presented by the complaint (R. 92-108). The Court of Appeals granted the several motions to dismiss on the grounds, first, that the certification of the Board was final and unreviewable on the authority of the decision of this Court in *Switchmen's Union v. National Mediation Board*, 320 U. S. 297 (1943); second, that the federal courts do not have jurisdiction over the issues involved in the light of the decisions of this Court in *General Committee v. M-K-T. R. Co.*, 320 U. S. 323 (1943), and *General Committee v. Sou. Pac. Co.*, 320 U. S. 338 (1943); and third, that, even if it be conceded that the District Court had jurisdiction to grant the relief asked, the cause of action against the Railroad seeking an injunction against coercion and influence had become moot because the controversy out of which that cause of action arose was terminated by the Board's certification of the Trainmen as the authorized bargaining representative of the class of employees in question, and because there was no allegation that the coercion and influence on the part of the Railroad was continuing (R. 114-115).

The petition for certiorari in this case goes only to the validity of the decision of the Court of Appeals in dismissing the appeal as to the Railroad and the Trainmen. It should be noted that the petitioners do not question the action of the Court of Appeals in dismissing the appeal as to the Board (Petition, 1). Nevertheless, even with the Board no longer a party to the suit, the petitioners take the position that the federal courts have the power to review a certification issued by the Board and set it aside in order to protect and enforce the statutory right of railroad employees to be free from coercion and influence on the part of a carrier (Petition, 10), i. e., the

power to control the action of the Board although it is not a party to the proceeding.

Briefly stated, the only question raised by the petition is whether or not the decisions of this Court in *Switchmen's Union v. National Mediation Board*, *General Committee v. M-K-T. R. Co.*, and *General Committee v. Sou. Pac. Co.*, *supra*, govern this case. The merits of the complaint are not in issue. However, by admitting that the Board is not properly a party to this proceeding, the petitioners put themselves in a weaker position for reversal of the Board's certification than was the position of the petitioners in the *Switchmen's Union* case, where the Board was a party to the suit.

In the light of these circumstances, respondent restates the first of the "Questions presented" in the petition, as follows:

In view of this Court's decision in the *Switchmen's Union* case, do the federal courts have the power to set aside a certification issued by the Board, when the Board is not a party to the litigation, on the basis of allegations to the effect that the carrier had interfered with and coerced certain of its employees in their choice of a representative?

The second of the "Questions presented," as stated in the petition, is not relevant at the present stage of this case. That question merely raises the issue of whether or not coercion and interference by a carrier in its employees' choice of a representative is forbidden by the Railway Labor Act if such coercion and interference occurs prior to, rather than during, the election at which the representative is chosen. A decision on that question was not necessary in the Court of Appeals below on motions to dismiss the appeal and it is, consequently, not necessary here. In fact, the court below intimated (R. 114-115) that it considered the Railway Labor Act as forbidding coercion by a carrier at any time, but it felt bound

to dismiss the appeals because the Board's ultimate certification ended the matter. Therefore, for the purposes of this petition, the question of the time when the alleged coercion occurred is immaterial, so long as it is clear from the record that it occurred prior to the certification by the Board.

SUMMARY OF ARGUMENT

The decision of this Court in the *Switchmen's Union* case renders the certification of the Board final and unreviewable. The fact that the certification is attacked on the ground that the railroad engaged in coercion and influence of its employees does not serve to subject the certification to judicial review. Since the issues involved in the instant case and the facts presented therein are closely parallel to the issues and facts involved in the *Switchmen's Union* case, that decision cannot be distinguished. The fact that the Board is no longer a party to the proceedings and therefore has no opportunity to defend its action before this Court makes it even clearer that its certification is immune to judicial review in the present case.

The petitioners' charges of coercion and influence on the part of the railroad are based entirely upon alleged violations of the petitioners' so-called exclusive bargaining rights. The present case is therefore founded upon a jurisdictional dispute, and it has been held by this Court in the *M. K. T. R. Co.* case and the *Southern Pacific* case that such disputes do not present justiciable issues. The fact that a jurisdictional dispute is presented to the courts as a matter of coercion and influence does not serve to render such a dispute subject to the jurisdiction of the courts.

The issues raised by the charges of coercion and influence on the part of the railroad have become moot. The violations of the Railway Labor Act charged by the peti-

tioners are violations of the rights of employees, and the petitioners no longer represent any class of employees on the Pennsylvania Railroad and therefore have no standing to complain of alleged infringement of employees' rights. Furthermore, the controversy with respect to which such infringement is alleged to have occurred is ended by the Board's certification, and the infringement cannot now be continuing. Consequently, neither injunctive nor declaratory relief in connection with the charges made by petitioners is any longer available to them.

ARGUMENT.

I.

Under the Switchmen's Union Decision, the Federal Courts do not Have the Power to Set Aside a Certification of the National Mediation Board, and the Fact That the Certification is Attacked on the Ground That the Railroad Engaged in Coercion and Influence Does not Alter the Result.

In the case of *Switchmen's Union v. National Mediation Board*, 320 U. S. 297 (1943), the facts were that the Board held an election among all the yardmen on the New York Central System in order to determine their choice of a representative and certified the Trainmen as the duly authorized bargaining agent of all yardmen. The switchmen's organization contended that the yardmen on certain designated parts of the System should have been permitted to vote separately for a representative. Section 2, fourth, of the Railway Labor Act, as amended (45 U. S. C. Sec. 151, *et seq.*) provides among other things that:

"The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act."

It was the position of the Switchmen's Union that the employees whom they had represented were denied this right by the action of the Board in voting all yardmen on the System as a craft unit.

Upon a review of the legislative history of the applicable provisions of the Railway Labor Act, this Court concluded that the action of the Board in holding an election and issuing a certification was not subject to judicial review. That conclusion was based upon several considerations. In the first place it was found that Congress had delegated to the Board the task of protecting the "right" of employees embodied in Section 2, fourth, of the Act, and, since Congressional specification of one method for the protection of a right normally excludes other methods, it is to be assumed that Congress did not contemplate judicial review. Secondly, the provisions of Section 2, ninth, of the Act making compliance with the Board's certification mandatory were viewed as also indicating that Congress intended such a certification to be final and conclusive.

To indicate that the present case is controlled by the decision in *Switchmen's Union v. National Mediation Board*, *supra*, it is only necessary briefly to review the facts. The petitioners assert that the Railroad and the Trainmen conspired to violate the "right" of employees, set forth in Section 2, third, of the Act, to designate their representatives without interference, influence, or coercion on the part of the carrier. That "right," like the right involved in the *Switchmen's Union* case, is protected by Section 2, ninth, wherein it is provided that:

"In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier." (Emphasis supplied.)

Furthermore, the statutory mandate of Section 2, ninth, requiring the carrier to give effect to the Board's certification is of no less significance in the present case than it was in the *Switchmen's Union* case. The form of the attack is immaterial once it is found that Congress intended that certification to be final. Finally, it should be noted that in this case, as in the *Switchmen's Union* case, the Board was fully aware of the facts on the basis of which its certification is attacked. The Conductors brought to the attention of the Board the charges of interference and coercion on the part of the Railroad. Those charges were before the Board when it issued its certification and, accordingly, the certification must be taken as a determination of the entire representation dispute including the allegations of carrier coercion.*

Despite the seemingly perfect parallel between the circumstances of the present case and of the *Switchmen's Union* case, it is contended by the petitioners that a different rule should here apply. The petitioners, in attempting to distinguish the present case from the *Switchmen's Union* case, place great emphasis upon certain language in the opinion in the latter case and particularly upon certain references to *Texas & N. O. R. Co. v. Ry. Clerks*, 281 U. S. 548 (1930), and *Virginian Ry. v. Federation*, 300 U. S. 515 (1937). It is true that in the *Texas & N. O. R. Co.* case the Supreme Court held that under the Railway Labor Act of 1926 the right of employees to be free from

*The Board twice gave its reasons for failure to take action in connection with the charges of coercion. First, in an informal letter to the Conductors (R. 33-40), the Board ruled that it had no jurisdiction over the alleged coercion because it occurred prior to the election. Second, in an equally informal manner in its brief on the merits of the appeal in the court below, the Board stated that another reason for its rejection of the Conductor's charges was that those charges, even if true, did not set forth a case of carrier coercion or interference relating to the designation of a representative by the employees. It thus appears that the first informal statement of reasons by the Board should not be treated as the only basis for the Board's action, as the petitioners here attempt to do. If the Board were now a party to this proceeding it might be able to give this Court a perfectly valid reason for its action with regard to the Conductors' charges of coercion.

coercion and influence by a carrier in their choice of a representative may be enforced in an appropriate suit. It should be remembered, however, that under that Act there was no provision for administrative enforcement of that right such as is now contained in Section 2, ninth, of the Act, as amended in 1934. The significance of that change is made plain by what this Court said in the *Switchmen's Union* case (at p. 300 of 320 U.S.), viz., that the only purport of the *Texas & N. O. R. Co.* decision was that "if the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control." Since the right, guaranteed by Section 2, third, of the Act, to be free from carrier interference and coercion is now protected by being made a part of the duty of the Board under Section 2, ninth, there is no longer any reason for the courts to assume the enforcement of that right when the Board has taken jurisdiction of the representation dispute and issued a final certification.

The *Virginian Ry.* case, *supra*, involved the question whether the federal courts had jurisdiction to enforce the provisions of Section 2, ninth, requiring a carrier to treat with a representative designated and certified by the Board. Since no other means for the enforcement of that provision were specified in the Act, this Court held that judicial enforcement of the statutory mandate was appropriate. That case has no application here because it dealt solely with a provision of the Act for which no means of enforcement, either administrative or judicial, was provided by Congress.*

Thus, the decision in the *Texas & N. O. R. Co.* and *Virginian Ry.* cases, holding judicial relief available under the facts there presented, were founded on the fact that no other means for the enforcement of the substantial

* Although an injunction against coercion and interference had been issued by the lower court in that case, the carrier did not challenge that part of the decree on appeal to this Court.

rights at issue had been provided by Congress and it was therefore proper to assume that Congress intended they should be enforced judicially. But the Act as it now stands, since the 1934 amendment, specifically provides for the enforcement by the Mediation Board of the employees' statutory rights to freedom from coercion and influence,* and this Court held in the *Switchmen's Union* case that the Act also makes plain the intent of Congress that the courts should not interfere with the Board's discharge of the duties laid upon it by the statute. The Court found in the language of the Act a clear indication that Congress specifically intended that representation disputes such as that involved in the *Switchmen's Union* case and in the present case were not to become matters of judicial concern after the Board had spoken.†

Therefore, the ultimate significance of the decision in the *Switchmen's Union* case cannot be limited by a strained analysis of certain prior opinions cited by the Court. The fact that there is no limitation or exception to the rule that a Board certification is final and unreviewable appears from the statement of this Court's conclusion in the *Switchmen's Union* case:

"Where Congress took such great pains to protect the Mediation Board in its handling of an explosive problem, we cannot help but believe that if Congress had desired to implicate the federal judiciary and to place on the federal courts the burden of having the final say on any aspect of the problem, it would have made its desire plain * * *

"Under this Act Congress did not give the Board discretion to take or withhold action, to grant or deny relief. It gave it no enforcement functions. It

* The Act provides a second means of enforcement of the right to freedom from coercion and influence in the criminal penalties provided for violation of that right in section 2, tenth.

† See also the language of this Court's opinion in *General Committee v. M. K. T. R. Co.*, 320 U. S. 323, at pp. 332-3.

was to find the fact and then cease. Congress prescribed the command. *Like the command in the Butte Ry. case it contained no exception. Here as in that case the intent seems plain—the dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law.** (Emphasis supplied.)

Since the formal administrative finding of the Board in the present case, certifying the Trainmen as the duly designated and authorized representative of road conductors on the Pennsylvania Railroad, has been construed as the final step in the settlement of representation disputes, the present action represents nothing more than an attempt to drag out that controversy in the courts.

In the present case, the rule of administrative finality of a Board certification applies with even greater force than it did in the *Switchmen's Union* case. The Board is no longer a party to the present proceedings. If the federal courts do not have the power to set aside a certification of the Board in a proceeding to which the Board is a party, it follows *a fortiori* that the certification cannot be nullified in a proceeding to which the Board is not a party.

Petitioners, by their position at this stage of the case, show themselves to be in an inextricable dilemma, made inevitable by the *Switchmen's Union* case. By virtue of that decision, they are forced to admit that they cannot obtain relief against the Board. Therefore, they do not name the Board as a respondent to their petition. On the other hand, they cannot obtain the relief which they seek, unless they succeed in having the Board's certification set aside, and their petition makes it plain that that is their objective (Petition, 10). But any proceeding the purpose of which is to set aside an administrative determination such as that of the Board in this case must cer-

* *Switchmen's Union v. National Mediation Board*, 320 U. S. 297, at pp. 303, 305.

tainly include the administrative body as a party so that that body may defend its determination.* Without the Board as a party, petitioners must fail in their admitted attempt to have the Board's certification set aside. And if the Board were made a party, their petition would appear even more obviously to be what it in fact is, namely, an attempt to obtain judicial review of the Board's determination, which is precluded by the decision of this Court in the *Switchmen's Union* case.

It is clear that the petitioner's ultimate contention in this case is that the federal courts can and should accomplish indirectly something which this Court has held they have not the power to accomplish directly. The fundamental inconsistency in the petitioners' position is that they recognize the full sweep of the *Switchmen's Union* case in insulating the Board's certification from judicial review under all circumstances, but at the same time they attempt to carve out of the principle announced in that case the large field of representation disputes in connection with which the employees who are dissatisfied with the result may claim that their right to be free from coercion and influence has been violated by the carrier. If any such exception can be read into the decision of this Court in the *Switchmen's Union* case, it becomes apparent that few representation disputes will in reality be settled by a certification of the Board.

* Although the federal courts seem never to have been called upon to decide specifically that an administrative agency is an indispensable party to a proceeding to set aside or modify one of its administrative findings, such a rule is necessarily implied in a number of cases dealing with the question as to which one of several public officers or agencies are necessary parties to the suit. See *Wells v. Roper*, 246 U. S. 335, 337 (1918); *North Dakota v. Chicago & N. W. Ry. Co.*, 257 U. S. 485, 490 (1922); *Board v. Pacific Oil Co.*, 299 U. S. 65, 70-71 (1936); *Neher v. Harwood*, 128 F. 2d 846 (C. C. A. 9th) (1942).

II.

Under the Decisions of this Court in the *M. K. T. R. Co. Case* and the *Southern Pacific Case*, Charges of Coercion and Influence on the Part of a Railroad are not Justiciable when the Alleged Coercion and Influence Consists of an Asserted Violation by the Railroad of the Jurisdictional Rights of a Labor Organization.

In both the *M. K. T. R. Co.* case and the *Southern Pacific* case, as in the instant case, the petitioner was a labor organization and the respondents were a carrier and a rival labor organization. In each of those cases, the petitioner complained that the railroad involved had entered into agreements with the respondent labor organization, and the petitioner contended that those agreements were illegal and void under the Railway Labor Act because they represented an encroachment upon the bargaining authority or jurisdictional rights of the petitioner. Upon a review of the history and applicable provisions of the Act, this Court concluded that the federal courts are without power to resolve such controversies because the issues raised are not justiciable. It was found that Congress had not specifically provided for the judicial determination of jurisdictional disputes and "that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate."

The present case is controlled by the decisions of this Court in the cases cited above. Here, the entire controversy had its inception in, and now rests ultimately upon, an agreement between the Railroad and the Trainmen, which agreement, the petitioners contend, invaded and encroached upon the petitioners' "jurisdictional rights" (Petition, 5). The acts of coercion and interference with which the Railroad is charged consist merely of asserted violations of the petitioners' bargaining jurisdiction in connection with that agreement.

* *M. K. T. R. Co.* case, 320 U. S. 323, at page 333.

As set forth in respondent's Statement, at page 3, *supra*, the amended complaint asserted that the Railroad and the Trainmen concluded an agreement providing for the rates of pay and working conditions of a class of employees whom the Conductors had the exclusive right to represent; that the Railroad publicized that agreement among all of the employees represented by Conductors; that the Railroad made settlement with the Trainmen, on the basis of that agreement, of certain time claims of employees presented by the Trainmen; and that the Railroad continued to deal with the Trainmen, and refused to deal with the Conductors, in regard to matters involving certain employees whom the Conductors claimed the exclusive right to represent. These alleged acts are the only specific acts upon which the petitioners rely for their charge of interference and coercion.

The controversy presented by this complaint is in substance only a familiar form of jurisdictional dispute between the Conductors and the Trainmen. Speaking of such disputes, this Court said in the *M.-K.-T. R. Co.* case, at pp. 334-7 of 320 U. S.:

"It is true that the present controversy grows out of an application of the principles of collective bargaining and majority rule. It involves a jurisdictional dispute—an asserted overlapping of the interests of two crafts. It necessitates a determination of the point where the authority of one craft ends and the other begins or of the zones where they have joint authority. . . . Congress did not attempt to make any codification of rules governing these jurisdictional controversies. It did not undertake a statement of the various principles of agency which were to govern the solution of disputes arising from an overlapping of the interests of two or more crafts. It established the general principles of collective bargaining and applied a command or prohibition enforceable by judicial decree to only some of its phases. . . .

"It seems to us plain that when Congress came to the question of these jurisdictional disputes, it chose not to leave their solution to the courts. * * * Rather the conclusion is irresistible that Congress carved out of the field of conciliation, mediation and arbitration only the select list of problems which it was ready to place in the adjudicatory channel. All else it left to those voluntary processes whose use Congress had long encouraged to protect these arteries of interstate commerce from industrial strife. The concept of mediation is the antithesis of justiciability." (Emphasis supplied.)

The amended complaint in this case presents issues which fall squarely within the principles expressed in the language of this Court quoted above. As in the *M.-K.-T. R. Co.* case, there is here "an asserted overlapping of the interests of two crafts," and, although the petitioners contend that the actions of the Railroad in dealing with the jurisdictional dispute amounted to coercion of employees in their choice of a representative, a decision on those charges of coercion plainly "necessitates a determination of the point where the authority of one craft ends and the other begins." Thus, the petitioners' contention must be to the effect that, although the federal courts have not been given the power to resolve jurisdictional disputes, it is only necessary to assert that the dispute developed into carrier coercion and interference in order to place the jurisdictional controversy before the courts.

In the final analysis, the petitioners are attempting to distinguish the *M.-K.-T. R. Co.* case and the *Southern Pacific* case by the same reasoning by which they attempt to distinguish the *Switchmen's Union* case. Their ultimate contention is simply that the federal courts may accomplish indirectly an adjudication of a jurisdictional dispute, though by direct action such disputes are not

justiciable. If the petitioners are correct in their contention, that a jurisdictional dispute is justiciable so long as it is presented to the courts as a matter of coercion and influence by a railroad, it appears certain that all such disputes will ultimately find their way into the courts, and the *M.-K.-T. R. Co.* case and the *Southern Pacific* case will have no practical significance as interpretations of the Railway Labor Act.

III.

Since the Administrative Finding of the Board is Unreviewable, the Issues Raised by the Charges of Coercion and Influence on the Part of the Railroad are now Moot, and the Petitioners, Having Ceased to Represent the Employees Involved, Have no Standing to Complain.

The Court of Appeals, in addition to holding that the petitioners' case did not present questions within the jurisdiction of the court because of the finality of the Board's certification, also found (R. 115) that the issue of coercion by the Railroad had become moot because the controversy out of which those charges arose had been brought to an end and because there was no allegation in the amended complaint which would indicate that the alleged coercion was continuing. It is submitted that this conclusion is sound.

Since it has been shown above that the *Switchmen's Union* case cannot upon any rational basis be distinguished from the present case, more particularly because the proceeding against the Board has been dropped by the petitioners, it remains only to be determined whether the petitioners have a cause of action against the Railroad and the Trainmen over which the courts can exercise jurisdiction.

Once it has been settled that the action of the Mediation Board in certifying the Trainmen as the duly desig-

nated and authorized representative of the class of road conductors on The Pennsylvania Railroad is final and unreviewable, it follows that the Conductors no longer possess any legal standing to assert or "protect" the rights of road conductors even if it should be assumed that those rights were violated by the carrier. The Railway Labor Act, in Section 2, confers and imposes a number of statutory rights and duties upon the respective parties to railway labor disputes. Section 2 confers no rights upon railroad labor organizations, as such, apart from the rights which they may acquire by virtue of their representation of a class or craft of railroad employes. The rights are conferred in the first instance upon the employes themselves, and this is quite evident from the language of the Act. Thus, Section 2, under the heading: "General Purposes," provides for:

"freedom of association among *employees*"

and for the:

"complete independence of carriers and of *employees* in the matter of self-organization."

Section 2, first, specifies the duties of "all carriers and *employees*."

Section 2, second, provides for the handling of disputes between carriers and their employes.

Section 2, fourth, provides that it shall be unlawful for any carrier "to influence or coerce *employees* in an effort to induce them to join or remain or not to join or remain members of any labor organization." It is clear, therefore, that the subsections of Section 2 of the Act deal with the rights, duties, and relations between the carriers and their employes, both individually and collectively. The railroad labor organization enters this statutory scheme merely as the statutory "representative of employes" and obviously its status as such statutory

representative rests, under the statutory scheme, on the Board's certification of it as such statutory representative.

The "right" which the petitioners in this case purport to be enforcing is therefore a right which belongs only to the class of road conductors on the Pennsylvania Railroad and not to the petitioners as a labor organization which at one time represented that class or craft. The finality of the Board's certification of the Trainmen as the duly authorized and designated representative of the road conductors not only terminates the petitioners' rights of representation for collective bargaining purposes but also ends their standing in court to seek judicial enforcement of those rights of road conductors which are alleged to have been violated by the Railroad. If those rights have been violated they may be judicially enforced, if at all, by the individual employes concerned or by their present statutory representative, the Trainmen, but in no view of the case may those rights now be enforced by the petitioners.

Another effect of the finality of the Board's certification is to close the entire representation dispute. Since the dispute is ended, it is evident that no further acts of alleged coercion or interference are continuing with respect to that dispute. In view of these facts an injunction will not lie to prevent the Railroad from performing acts which it is not now committing and cannot now commit.

Furthermore, since the Board has acted and has designated the Trainmen as the representative of road conductors on the Pennsylvania Railroad, a declaratory judgment proceeding to determine whether or not the alleged acts of the Railroad constituted interference, influence or coercion would not lie because no actual controversy is any longer presented and the question has become theoretical, so that a decision thereon would not in any way affect the rights or other legal relations of the parties.

It can thus be said that, since the Board is no longer involved in the proceeding, and since its certification is final and unreviewable, the issues between the Conductors, on the one hand, and the Railroad and the Trainmen, on the other hand, have become moot. Therefore, if the action of the Court of Appeals in dismissing the appeal as to the Board was proper (and it is admitted by the petitioners that it was proper), it follows that the court's decision in dismissing the appeal as to the Railroad and the Trainmen was inevitably required because the issues on those appeals are no longer alive.

CONCLUSION.

From the foregoing analysis, it will be seen that the basic question in the instant case is whether or not the decisions of this Court in the *Switchmen's Union, M.-K.-T. R. Co.*, and the *Southern Pacific* cases are capable of being distinguished from the present case. If the *Switchmen's Union* case applies, the certification issued by the Board in the instant case is final and the petitioners are no longer the statutory bargaining representative of the class of road conductors on the Pennsylvania Railroad. Furthermore, whether or not the certification of the Board is subject to being reviewed by the Federal courts, that certification cannot be attacked successfully on the basis of the facts relied upon by the petitioners in this case. Those facts merely set forth a familiar type of jurisdictional dispute, and this Court has held in the *M.-K.-T. R. Co.* and *Southern Pacific* cases that such controversies are not justiciable. Consequently, the facts of such a jurisdictional dispute could not possibly serve as the basis for setting aside a certification of the Board. Finally, if the certification of the Board is final and unreviewable, the petitioners would have no standing to present the instant case to the courts even though justiciable issues were in-

volved, because the controversy with respect to which those issues arose has been terminated and the petitioners have no legal interest in those issues.

It is submitted that there is presented here no question of general importance, of Federal statutory construction, or of departure from the decisions of this Court calling for review upon certiorari. It is therefore respectfully submitted that the petition should be denied.

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APPENDIX.**Excerpts from the Railway Labor Act.**

(Act of May 20, 1926, as amended by Act of June 21, 1934;
45 U. S. C., Sec. 151, *et seq.*)

"GENERAL PURPOSES.

"Sec. 2. The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

"GENERAL DUTIES.

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to

confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

"Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other: and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

"Fourth. Employees shall have the right to organize, and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an em-

ployee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

"Tenth. The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than \$1,000 nor more than \$20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States; all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent."

IN THE
Supreme Court of the United States

OCTOBER TERM, 1944.

ORDER OF RAILWAY CONDUCTORS OF AMERICA,
H. W. FRASER, AS PRESIDENT OF THE ORDER OF
RAILWAY CONDUCTORS OF AMERICA, ETC., ET AL.,
Petitioners,

vs.

THE PENNSYLVANIA RAILROAD COMPANY AND
BROTHERHOOD OF RAILROAD TRAINMEN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT
OF COLUMBIA

**BRIEF FOR RESPONDENT, BROTHERHOOD OF
RAILROAD TRAINMEN IN OPPOSITION.**

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hood of Railroad Trainmen.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1944.

No. 200.

ORDER OF RAILWAY CONDUCTORS OF AMERICA.

H. W. FRASER, AS PRESIDENT OF THE ORDER OF
RAILWAY CONDUCTORS OF AMERICA, ETC., ET AL.,

Petitioners,

vs.

THE PENNSYLVANIA RAILROAD COMPANY AND
BROTHERHOOD OF RAILROAD TRAINMEN.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT
OF COLUMBIA.

**BRIEF FOR RESPONDENT, BROTHERHOOD OF
RAILROAD TRAINMEN IN OPPOSITION.**

OPINIONS BELOW.

The *per curiam* opinion of the Court of Appeals reported in 141 F. (2nd) 366 will be found in the printed record at pages 113-115 and the judgment and order of the District Court (D. C.) at page 89.

JURISDICTION.

The jurisdiction of this Court is invoked by the petitioners under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. Section 347 (a).

STATUTE INVOLVED.

The pertinent provisions of the Railway Labor Act, as amended by the Act of June 21, 1934 (45 U. S. C., Sec. 151, et seq.) are set forth in the Appendix to this brief.

COUNTERSTATEMENT.

The Petitioners pray a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in this cause on March 27, 1944, dismissing the petitioners' appeal as to the Pennsylvania Railroad Company (hereinafter called Pennsylvania) and the Brotherhood of Railroad Trainmen (hereinafter called BRT).

"No review is sought of the Court of Appeals' judgment in so far as it dismissed the petitioners' appeal as to the National Mediation Board and its members."
(Pet. 1.)

The separate motions to dismiss filed by each appellee were based upon the three following cases decided by this Court on November 22, 1943 subsequent to the petitioners' appeal:

General Committee of Adjustment v. Missouri-Kansas-Texas Railroad Co., 320 U. S. 323,

General Committee of Adjustment v. Southern Pacific Company (General Grievance Committee v. General Committee of Adjustment) 329 U. S. 338, and

Switchmen's Union of North America, et al., v. National Mediation Board, Brotherhood of Railroad Trainmen, et al., 320 U. S. 297.

The appeal was taken from the judgment and order entered on June 11, 1943 by the District Court of the United States for the District of Columbia dismissing petitioners' complaint, amended complaint and denying motion for summary judgment (R. 89). The petitioners' (Order of Railway Conductors, an unincorporated association, and four of their officers, hereinafter referred to as ORC) original complaint filed on November 25, 1942, asked for declaratory and injunctive relief against the Pennsylvania and the BRT but the Board or its members were not made parties defendant. The amended complaint which added the Board and its members as parties defendant was filed on January 7, 1943, and attempted to have set aside an election conducted by the Board among the road conductors on the Pennsylvania lasting from December 5 to December 19, 1942, and also sought to set aside the Board's certification of December 27, 1942 (par. 45, R. 20):

"That the Brotherhood of Railroad Trainmen has been duly designated and authorized to represent the craft or class of road conductors employed by the Pennsylvania Railroad for the purposes of the Railway Labor Act." (R. 75-76).

In addition it sought to enjoin the Board from holding any other election until it found that certain alleged practices did not constitute unlawful influence or coercion within the meaning of the Railway Labor Act and further prayed that in the alternative the court declare that the practices complained of against the Pennsylvania Railroad constituted unlawful interference, influence or coercion and asked that the defendant Mediation Board be enjoined from holding an election, etc., until after the Board finds that such alleged interference, influence, etc., has ceased. The court was also asked to declare, that certain contractual provisions entered into by the Pennsylvania R. R. and

the BRT prior to the election, be declared void because covering road conductors allegedly included in the ORC's contract, and that the ORC be declared as the accredited representative of the conductors, to have the exclusive right to negotiate and bargain collectively for the road conductors (R. 20-21-22).

The amended bill of complaint and record shows the following. In April of 1927 the ORC representing Pennsylvania road conductors, Pennsylvania and BRT entered into a joint schedule or contract, which was entered into jointly because the work of road conductors and road brakemen were closely related; the BRT for a long time represented road brakemen, yard conductors, yard brakemen, baggagemen and switch tenders (Amended Complaint, hereinafter referred to as A. C., par. 11, R. 5).

On April 18, 1941, Pennsylvania served notice upon the ORC and BRT in compliance with the Railway Labor Act of its desire to change certain regulations. Joint conferences pursuant thereto were held (par. 12, A. C., R. 5) until petitioner, ORC, served written notice of its withdrawal dated August 3, 1942 (par. 14, A. C., R. 7).

On August 14, 1942, Pennsylvania and BRT signed an agreement covering yard conductors, road and yard brakemen, baggagemen, assistant conductors or ticket collectors and switch tenders which contract included paragraph P-A-1 covering assistant conductors or ticket collectors, (par. 15, A. C., R. 7-8) and par. 5.N-5 and 5.N-6 (R. 9-10-11) covering the displacement of brakemen, baggagemen and switchtenders by road conductors on the extra list.

¹ Road and yard brakemen, baggagemen and switchtenders were and are admittedly represented by the BRT (A. C., par. 11, R. 5).

² Although alleged (pgt. 5) a new class of employees created and included in contract of August 17, 1942, viz.: assistant conductors, rates of pay for this class were specified on p. 11 of joint contract between Pennsylvania, BRT and ORC April 1, 1927 (R. 91).

5.N-6 (a) (A. C., par. 17, p. 11) specifies the manner of calling employees admittedly represented by the BRT for conductor vacancies when regular or extra conductors are not available.

On September 23, 1942, the BRT filed an invocation with the National Mediation Board asking that they be certified as the representative for the road conductors; which invocation was accompanied by the required authorizations (A. C., par. 34, R. 17 and R. 20).

On October 28, 1942, the ORC addressed a letter to the Mediation Board which purported to state in detail the events leading up to the invocation, and the allegation of coercion and influence (R. 23 to 33). This letter also objected to the holding of an election during war time because a large number of men, who formerly worked as brakemen and baggagemen were then working as promoted conductors and upon termination of the emergency would go back to brakemen, flagmen and baggagemen. This paragraph 4, beginning at R. 31, concludes at page 32 (R.):

"An election at this time would place the balance of power with men whose positions as conductors will terminate at the end of the war."

On November 9, 1942, the Board replied to the ORC's letter and detailed the Board's reasons for finding it was not empowered to hold a formal hearing but invited a discussion with the plaintiff (R. 33 to 40). This discussion took place on November 13, 1942 (A. C., par. 38, P. 18).

On November 20, 1942, the ORC representatives agreed with the BRT representatives and the Mediation Board in writing that

"To settle the dispute, should the National Mediation Board find that a dispute exists among the Road

Conductors, employees of the Pennsylvania Railroad, and order an election, the eligible list of such Road Conductors entitled to vote in such an election shall be: * * *. (BRT Ex. D. R. 83-84-85).

and on December 2, 1942, agreed in writing to the list of eligible voters to be used in conducting an election by the Board (BRT Ex. E. R. 85-86), and on December 19, 1942, agreed that the election conducted by the Mediation Board from December 5, 1942, to December 19, 1942, which showed 3,283 eligible voters of whom 1,122 voted for the ORC and 1,680 for the BRT, was conducted in a fair and impartial manner and the secrecy of the ballots was kept inviolate to which said ORC representatives attested in writing (BRT Ex. F. R. 86-87-88); accordingly on December 27, 1942, the Board certified the BRT as the representative of the road conductors (R. 75-76).

On January 7, 1943 (3¹/₂ months after the BRT invocation³) four ORC officers filed an Amended Bill of Complaint for declaratory and injunctive relief against the Pennsylvania, the BRT and for the first time made the Mediation Board and its members parties defendant. After answers were filed by all parties, the ORC on March 8, 1943, made a motion for summary judgment (R. 65-66-67) to which answers were filed by all parties and on June 11, 1943, the following judgment and order was entered by the District Court (R. 89):

The above-entitled case, having come on for hearing on plaintiff's motion for a summary judgment; and the Court having considered the motion, defendants' answers thereto, affidavits of the parties, the pleadings and oral argument of counsel; and the Court being of the opinion that there is no genuine issue as to any material fact with respect to the relief requested under the motion for summary judgment; but

³ BRT invocation filed with Board September 23, 1942 (R. 17).

the Court being of the further opinion that the facts admitted as true and all other facts alleged in the complaint and amended complaint of the plaintiffs, do not establish that the plaintiffs have any cause of action; it is by the court this 11th day of June, 1943.

ADJUDGED, ORDERED AND DECREED:

1. That the plaintiffs' motion for a summary judgment be and the same is hereby denied;
2. That the complaint and the amended complaint be and the same are hereby dismissed;
3. That costs are awarded to defendants.

S. DANIEL W. O'DONAGHUE,

June 11, 1943.

Justice."

From the District Court's action the ORC appealed to the Court of Appeals for the District of Columbia.

After briefs had been filed in this appeal, but before argument, the Supreme Court decided the *M-K-T, Southern Pacific* and *Switchmen's* cases, *supra*, which furnished the basis for three separate motions to dismiss the appeal filed by each appellee, the present respondents.

"In opposing these motions, the petitioners conceded that under this Court's decisions in the above cases the District Court and the Court of Appeals may have had no jurisdiction to consider the issue raised by the motion for summary judgment—whether the election and certification should be set aside for the reason that the Board had conducted the election and certified the winner without first investigating or considering ORC's charges of carrier interference." (Pet. 8).

The Court of Appeals ordered printed briefs filed by all parties and held a hearing on the motions to dismiss on February 17, 1944. The three separate motions were granted, but the petitioners do not ask certiorari as to the Court's action in granting the Board's motion to dismiss.

The appellate Court based its dismissal on three grounds; first: That under the *Switchmen's* case the Federal Courts lacked jurisdiction to review in any respect the action of the Board in jurisdictional representative disputes; second: that even though there were allegations of influence affecting the electors, after the certification was made by the Board, the *Switchmen's* decision, *Brotherhood v. United Transport Service Employees* (320 U. S. 715), *M-K-T* and *Sou. Pac.* cases, foreclose the question presented and deprive the Courts of all rights of interference, and third: that the relief then being sought was bootless in the present situation.

QUESTIONS PRESENTED.

1. Whether or not, it being conceded by the petitioners that the Federal Courts have no jurisdiction to review the action of the Board for the purpose of setting aside its certification, the Federal Courts have the power to set aside said certification upon an allegation of conduct antedating the election alleged to have influenced the employees in their choice of a representative, when these identical charges were presented to the Board by the petitioner and when an additional remedy was provided by Section 2, Tenth of the Act?

2. Whether or not in view of the decisions in the *Missouri-Kansas-Texas* case, the *Southern Pacific* case, and the *Switchmen's Union* case to the effect that the determination by the Board is conclusive and that jurisdictional disputes between labor organizations do not present justiciable issues under the Railway Labor Act, the action of the Court of Appeals in dismissing the petitioners' appeal is correct?

3. After raising no objection to the correctness of the appellate court's action in granting the Board's motion to dismiss the appeal by acknowledging the Board's action is not subject to review in issuing a certification, do the Courts have jurisdiction to annul the Board's certification when the Board is no longer a party to the proceedings by virtue of said dismissal?

ARGUMENT.

1.

The Courts have no jurisdiction under the Switchmen's Union decision to strike out the Board's certification, even though judicial consideration be asked of a part of the matter, which the Board ruled it had no jurisdiction to consider.

It is the petitioners' principal contention even though admitting the Mediation Board's action in certifying the BRT cannot be reviewed, that because the Mediation Board ruled it had no jurisdiction to consider alleged coercion ante-dating the election, the Court can consider this and if found to exist and to have influenced the conductors in their choice, can strike out the certification. This argument is apparently based upon the theory that, without the Court's intervention the Petitioners' right under Section 2 Third, would be "sacrificed or obliterated".

In the *Switchmen's* case the petitioners sought to have the determination by the Board of the participants and the certification of representatives cancelled.

"But in addition an injunction against the Brotherhood and the carriers was asked to restrain them from negotiating agreements concerning the craft of yardmen on the carriers' lines." (320 U. S. at p. 310).

This relief was asked by the Switchmen because it was alleged they were forced to participate in an invalid carrier-wide election. The Board had held that the

"Railway Labor Act vests the Board with no discretion to split a single carrier or combine two or more carriers for the purpose of determining who shall be eligible to vote for a representative of a craft or class of employees under Section 2, Ninth, of the Act, and the argument that it has such power fails to furnish any basis of law for such administrative discretion." (320 U. S. at p. 309).

The Court of Appeals reviewed the matter on its merits and it was pointed out by Mr. Justice Rutledge in the dissenting opinion (135 Fed. 2nd, at p. 802):

"In my opinion the Board, when it decided as a matter of law that the statute requires carrier-wide crafts as the voting unit, whenever the dispute raises that question, failed to exercise the judgment which the statute calls into play".

In this situation this Court could have reviewed the Board's decision or could have sent the matter back to the Board in order that it might have exercised its discretion to determine the craft or class on less than a carrier-wide basis. Instead, however, this Court reversed and held at 320 U. S. p. 300:

"We do not reach the merits of the controversy. For we are of the opinion that the District Court did not have the power to review the action of the National Mediation Board in issuing the certificate."

The opinion further found at pages 300 and 301:

"The Act, Section 2, Fourth, writes into the law the 'right' of the 'majority of any craft or class of employees' to 'determine who shall be the representative of the craft or class for the purposes of this Act' that

'right' is protected by Section 2, Ninth, which gives the Mediation Board the power to resolve controversies concerning it and as an incident thereto to determine what is the appropriate craft or class in which the election should be held. (emphasis supplied.)

* * * A review by the Federal District Courts of the Board's determination is not necessary to preserve or protect that 'right'. Congress for reasons of its own, decided upon the method for the protection of the 'right' which it created. It selected the precise machinery and fixed the tool which it deemed suitable to that end. Whether the imposition of judicial review on top of the Mediation Board's administrative determination would strengthen that protection is a considerable question. All constitutional questions aside, it is for Congress to determine now the rights which it creates shall be enforced. * * * In such a case the specification of one remedy normally excludes another.

There is little if any distinction in the proposition urged in the case at issue and the *Switchmen's* case where the Board ruled that it had no discretion to split a carrier for the purpose of recognizing groups who had bargained under one contract for a long period of years as a separate class or craft and the present case where the Board ruled it had no jurisdiction to consider coercion ante-dating the actual holding of an election. Since this Court in the *Switchmen's* case considered that the right was given under Section 2, Fourth, to have designated the appropriate crafts or class, incident to, whom might participate in an election under this Section, and if it considered that the Board failed to exercise its duty on the theory that it had no jurisdiction "to split a carrier" this court, should the petitioners' theory be correct, would have permitted the Federal Court to have considered the right given by Section 2, Fourth.

This Court held, however, at page 303:

"Where Congress took such great pains to protect the Mediation Board in its handling of an explosive problem, we cannot help but believe that if Congress had desired to implicate the federal judiciary and to place on the federal courts the burden of having the final say on any aspect of the problem, it would have made its desire plain."

II.

The decisions in the M-K-T and Southern Pacific cases conclusively determine that the issues presented in this case, are not justiciable.

It is claimed by the petitioners that the effect of the Pennsylvania's dealing with the BRT as to road conductors was coercive. In the letter of protest sent by the ORC to the Board they stated (A. C. par. 37, R. 17):

"That the said protest of the plaintiffs charged that the Penn RR was interfering with, influencing and coercing the said conductors in their choice of a bargaining representative by unlawfully bargaining with the BRT with respect to working conditions of the craft or class of road conductors, by infringing upon the jurisdiction of the ORC, by breaching an existing contract between the Penn RR and ORC. * * *"

This Court in the *General Committee, etc. v. Southern Pacific*, 320 U. S. at p. 342, states as follows:

"They point out that Section 2, Third and Fourth prohibit the carrier from influencing employees in their choice of representatives. The argument is that a contract by the carrier with the Engineers giving the latter the exclusive right to represent engineers in the presentation of their individual claims would

* The alleged infringement of the ORC contract however goes only to assistant conductors and alleged control of the conductors extra board (A. C. par. 27, R. 15).

In effect coerce all engineers into joining that union in violation of Section 2, Third and Fourth" (emphasis supplied.)

After discussing the history of the Act, this Court said at p. 342:

"All of these would be relevant data for construction of the Act if the courts had been entrusted with the task of resolving this type of controversy. But we do not think they were. * * * For the reasons stated in our opinions in the Missouri-Kansas-Texas R. Co. case and in the Switchmen's case, we believe that Congress left the so-called jurisdictional controversies between unions to agencies or tribunals other than the courts. We see no reason for differentiating this jurisdictional dispute from the others."

This Court held that the "right" given by Section 2, Fourth, is protected by Section 2, Ninth and a review by the Courts of the Board's determination is not necessary to protect that "right". Switchmen's case, 320 U. S. at 300-301. Since Section 2, Ninth, authorizes the Board to

"* * * to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence or coercion exercised by the carrier"

the right claimed by the petitioner under Section 2, Third, is protected by Section 2, Ninth and a determination by the Courts is not necessary to preserve or protect that right. It is claimed by the petitioner in the present case and pointed out in the Switchmen's case that these "rights" were not considered by the Board in the Switchmen's case

because the Board ruled it had no discretion to 'split a carrier' and in the present case because the Board ruled it had no jurisdiction to consider alleged coercion ante-dating the holding of an election.

Indeed the petitioners had additional means of protecting that right by proceeding under Section 2, Tenth and since it was claimed that coercion resulted because of the failure of the Pennsylvania to deal with them as the exclusive representative of road conductors as well as delaying conferences, the petitioners could have invoked the services of the Mediation Board under Section 5, First. (BRT appendix.)

III.

The Board's certification of the B. R. T. as the representative for the road conductors which admittedly is not subject to review leaves the petitioners who filed the Amended Bill of Complaint, representing no one but themselves and therefore having ceased to represent the employees involved, the charges of coercion and influence are now moot.

The Court of Appeals besides determining (R. 114) that under the *Switchmen's* case the Federal Courts lacked jurisdiction to review in any respect the action of the Board in jurisdictional representative disputes and that in the case of *Brotherhood v. United Transport Service Employees* the Supreme Court went further and extended the prohibition against judicial review to cases where the action of the Board was said to be clearly arbitrary, held as follows (R. 115):

"The prayer for injunctive relief against the Railroad, growing out of its alleged policy of coercion, which counsel continue to press, even if it be conceded the District Court has jurisdiction to grant the relief

asked, would be bootless in the present situation, since it is not alleged that coercion is continuing now, for the dispute which it is claimed gave it birth is over and done with, the controversy conclusively ended and put to rest by the Board's certification, and there is no reason to suppose there will be another request for an election".

It cannot be denied that the ORC and the four officers, who filed the amended bill of complaint have standing in this court only as the representative of the road conductors, however since by virtue of the certification the BRT represent the road conductors the petitioners have no standing to complain. An examination of the Railway Labor Act clearly shows that the only rights conferred, are those upon employees and since the BRT is now representing these employees, the petitioners cannot appear in a representative capacity.

Particularly is this true since the petitioners raised no objection to the Board's motion for dismissal and the Board is no longer a party to the proceedings. The claim that the Courts have jurisdiction to strike out an election and certification proceeding conducted by the Board, the investigation lasting from November 2, 1942 (R. 40) to December 2, 1942, and the election itself lasting from December 2, 1942 to December 19, 1942 inclusive (R. 86) involving the eligibility of thousands of employees and the secret polling of thousands of employees all over the Pennsylvania Railroad without the Board being a party to the attempted certification annulment, presents a most unusual situation and were it to be allowed in this case a precedent would be established, which would tend to defeat the purposes of the Railway Labor Act.

If the ORC deems that the election was held at a time when the balance of power was with respondent, BRT, be-

cause a large number of brakemen represented by the latter organization were working as conductors due to the heavy increase in traffic, they have a right, should they so desire to invoke the services of the Mediation Board for the purpose of holding another election but until they are certified by the Board as representing the road conductors, the ORC under the *Switchmen's* decision has no standing to complain on behalf of employees they do not represent.

CASES RELIED UPON BY PETITIONERS.

The petitioners rely under their "reasons for granting the writ" (pet. 11) upon the contention that the decision of the Court of Appeals is contrary to the decision in *Virginian Railway v. Federation*, 300 U. S. 515, and *Texas & N. O. R. Co. v. Ry. Clerks*, 281 U. S. 548. They further state that the decision of the Court of Appeals does not give proper effect to the decision of this Court in the *Switchmen's* case, *General Committee v. M-K-T R. Co.* and *General Committee v. Sou. Pac. Co.* An analysis of the *Texas v. Ry. Clerks* case which was decided first in point of time (May, 1930), shows that the clerks' organization was recognized by the railroad as representing a majority of the clerks from the time of its organization in 1918 until, after the clerks organization made application for an increase in wages. After the Texas denial of a wage increase the clerks referred the matter to the Mediation Board and while the matter was pending before the Board the railroad instigated the formation of a rival organization. Even though the District Court granted a temporary injunction, the railroad company thereafter recognized the so-called union formed by it and refused to recognize the Clerks' organization. The matter came up on a contempt proceeding against the railroad and certain of its officers, and

* Facts given in Court's Opinion 281 U. S. 553-556, 557-558.

on final hearing the temporary injunction was made permanent, and a motion to vacate the order in the contempt proceedings denied; all of which was affirmed on appeal and this Court granted certiorari. Mr. Justice Hughes, who delivered the Opinion of the Court, pointed out (P. 560) that those employees soliciting authorizations for the association sponsored by the railroad were permitted to devote their time to that enterprise without deduction from their pay and charge their expenses to the railroad company. They made reports of their progress to the company and as stated in the opinion at p. 560:

*** The discharge from the service of the Railroad Company of leading representatives of the Brotherhood and the cancellation of their passes, gave support, despite the attempted justification of these proceedings, to the conclusion of the courts below that the Railroad Company and its officers were actually engaged in promoting the organization of the Association in the interest of the Company and in opposition to the Brotherhood, and that these activities constituted an actual interference with the liberty of the clerical employees in the selection of their representatives. ***

The then Chief Justice states in the opinion at p. 568:

"The intent of Congress is clear with respect to the sort of conduct that is prohibited. 'Interference' with freedom of action and 'coercion' refer to well understood concepts of the law. The meaning of the word 'influence' in this clause may be gathered from the context. *Noscitur a sociis*. *Virginia v. Tennessee*, 148 U. S. 503, 519. The use of the word is not to be taken as interdicting the normal relations and innocent communications which are a part of all friendly intercourse, albeit between employer and employee. 'Influence' in this context plainly means pressure, the use of the authority or power of either party to induce action by the other in derogation of what the statute calls 'self-organization'."

The Clerk's case was decided before the 1934 Amendments to the Act empowering the Board to protect the right given under Section 2, Third, by the additions of Section 2, Ninth, and the addition of Section 2, Tenth, providing criminal penalties for the violation of Section 2, Third, etc. But for the injunctions asked of the Court, the Clerks would have been entirely without remedy even though their leaders were being discharged and their passes taken away for activity in favor of their organization.

This case serves a useful purpose to illustrate that Section 2, Third is not to be construed as interdicting the normal relations and innocent communications between employer and employee.

Nobody is contending in the present case that the Pennsylvania ever threatened discharge or the revocation of pass privileges. Indeed the complaint is based on conversations between Pennsylvania representatives and ORC representatives and the alleged coercive effects caused by the Pennsylvania and BRT agreement as to assistant conductors and the maintenance of the extra board. The latter proposition was almost the identical proposition considered by this Court in the *Sou. Pac.* case.

In the *Virginian Ry. Co. v. System Federation*, as the petitioners point out on page 15 of their brief was a suit brought under the Railway Labor Act as amended in 1934 to compel the carrier to treat with the plaintiff, the certified representative of the craft of the carrier's employees as required by Section 2, Ninth, and to enjoin the carrier from interfering with, influencing or coercing its employees in their choice of a representative in violation of Section 2, Third, which relief the District Court granted and was affirmed on appeal.

Mr. Justice Stone pointed out (300 U. S. at p. 539) that the petitioner (Virginian Ry.)

"* * * had failed to treat with the Federation as the duly accredited representative of petitioner's employees; that petitioner had sought to influence its employees against any affiliation with labor organizations other than an association maintained by petitioner, and to prevent its employees from exercising their right to choose their own representative; that for that purpose, following the certification, by the National Mediation Board, of the Federation, as the duly authorized representative of petitioner's mechanical department employees, petitioner had organized the Independent Shop Craft Association of its shop craft employees, and had sought to induce its employees to join the independent association, and to put it forward as the authorized representative of petitioner's employees."

The opinion further states (p. 541):

"Petitioner here, as below, makes two main contentions: First, with respect to the relief granted, it maintains that Section 2, Ninth, of the Railway Labor Act (45 U. S. C. A., Sec. 152, Subd. 9), which provides that a carrier shall treat with those certified by the Mediation Board to be the representatives of a craft or class, imposes no legally enforceable obligation upon the carrier to negotiate with the representative so certified, and that in any case the statute imposes no obligation to treat or negotiate which can be appropriately enforced by a court of equity". * * *

The distinction between the case at issue and the *Virginian* case is obvious. In the latter the Court was deal-

The court found that after the certification by the Mediation Board "The defendant, undertook circulation of a petition addressed to the Board to have this certification altered to deprive its employees of the right to representation by said System Federation, and thereafter did cause the Independent Union to be organized notwithstanding the certification".

The second contention was the defense based upon the allegation that the shop employees were not engaged in interstate commerce.

ing with a company union and the Virginian refused to treat with or recognize with the Federation certified by the Mediation Board. In this situation Section 2, Tenth, afforded no remedy because penalties were provided only for the failure of the carrier to comply with the terms of the third, fourth, fifth, seventh or eighth paragraphs of this Section, Section 2, Ninth, which states *inter alia* .

"Upon receipt of such certification the carrier shall treat with the representatives so certified as the representative of the craft or class for the purposes of this Act." (emphasis supplied)

was omitted from Section 2, Tenth. It is therefore apparent that without the injunctive relief granted by the equity court, the defense offered by the company that Section 2, Ninth, imposes no legally enforceable obligation upon the carriers to negotiate with the representatives so certified, would have been perfectly good and valid and the entire certification proceeding would have been simply a suggestion to the carrier to treat with the certified representatives.

The petitioners in the *Virginian* case offered no defense to that part of the injunction relating to interference, by pointing out that they would be liable criminally under Section 2, Tenth, for the violation of Section 2, Third, and obviously because of this, the opinion stated (pp. 543-544)

"The prohibition against such interference was continued and made more explicit by the amendment of 1934. Petitioner does not challenge that part of the decree which enjoins any interference by it with the free choice of representatives by its employees, and the fostering, in the circumstances of this case, of the company union. That contention is not open to it in view of our decision in the *Railway Clerks' Case*, *supra*, and of the unambiguous language of Section 2, Third, and Fourth, of the Act, as amended" (emphasis supplied).

As pointed out the *Clerks* case was decided prior to the passage of Section 2, Tenth.

In referring to the *Clerks* and *Virginian* cases in the opinion in the *Switchmen's* case, Mr. Justice Douglas, said at p. 300:

"In those cases it was apparent that but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act. The result would have been the 'right' of collective bargaining was unsupported by any legal sanction. That would have robbed the Act of its vitality and thwarted its purpose." (emphasis supplied.)

That portion of the opinion in the case of *Stark v. Wickard*, 321 U. S. 288, at 306-307, cited by the petitioners in their brief (p. 19) simply reaffirms that under the Railway Labor Act jurisdictional disputes between unions were left by Congress to mediation rather than adjudication, but where rights of collective bargaining, created by the Railway Labor Act, contained definite prohibitions of conduct or were mandatory in form, the Supreme Court enforced the rights judicially. The *Clerks* and the *Virginian* cases were referred to by the opinion as authority for this proposition.

Nothing, not already fully considered and passed upon by this Court, is presented by the petition.

Every contention urged by the petitioners as the basis for the granting of the Writ has been considered and ruled upon by the Supreme Court in the *Switchmen*, *M-K-T* and *Sou. Pac.* cases.

To summarize briefly:

The *Switchmen* claimed they were being denied the right given them under Section 2, Fourth, to "representa-

tives of their own choosing" by the Board's refusal to split the carrier on the ground that it lacked discretion to do so. It was shown that the merits of "less than carrier wide craft voting" was never determined by the Board.

In the present case the petitioners asked the Court to consider acts alleged to amount to coercion because the Board ruled it had no jurisdiction to consider acts of this nature preceding an election.

In the present case, as in the *M-K-T* case, one of the problems was the calling of employees for emergency service and the firemen as well as the ORC in the present case asked that certain contractual provisions entered into between the railroad and the union be declared void and that each be declared the sole representative. The only appreciable difference seems to be that in the present case the petitioners claim the effect of these contractual acts were said to be coercive.

Mr. Justice Douglas in tracing the evolution of the 1934 Amendment pointed out the remedies available under Section 5, First (320 U. S. p. 232) relating to a dispute concerning changes in rates of pay, rules and working conditions, not adjusted by the parties in conference.

The opinion states (p. 336):

"It is clear from the legislative history of Section 2, Ninth, that it was designed not only to help free the unions from the influence, coercion and control of the carriers but also to resolve a wide range of jurisdictional disputes between unions or between groups of employees. H. Rep. No. 1944, *supra*, p. 2; S. Rep. No.

¹ *M-K-T* Case 320 U. S. 326.

² Although this remedy, *inter alia* was available to the petitioners and although in their letter of protest to the Board they state (R. 2930) they intended to use it, for reasons best known to themselves, the ORC never availed themselves of it.

1065, 73d Cong., 2d Sess., p. 3. However wide may be the range of jurisdictional disputes embraced within Section 2, Ninth, Congress did not select the courts to resolve them." (emphasis supplied).

Even though all parties asked judicial interpretation this Court treated the entire matter as a jurisdictional dispute and stated (p. 336):

"It seems to us plain that when Congress came to the question of these jurisdictional disputes, it chose not to leave their solution to the courts."

The opinion distinguished the *Virginian* and *Clerks* cases upon which the petitioners principally rely, as follows (*M-K-T* case, 320 U. S. p. 335):

"In the *Clerks* case and in the *Virginian R. Co.* case the Court was asked to enforce statutory commands which were explicit and unequivocal. But the situation here is different. Congress did not attempt to make any codification of rules governing these jurisdictional controversies."

In the *Sou. Pac.* case, which this Court said (320 U. S. p. 339) involved the same basic question as present in the *M-K-T* case concerning the demotion of engineers to firemen and the calling of firemen for engineers in emergency service with the additional question as to the right of the Firemen to represent men working as engineers in the handling of individual grievances. The opinion states (p. 342):

"They point out that Section 2, Third and Fourth, prohibit the carrier from influencing employees in their choice of representatives. The argument is that a contract by the carrier with the Engineers giving the latter the exclusive right to represent engineers in the presentation of their individual claims would in

effect coerce all engineers into joining that union in violation of Section 2, Third and fourth." (emphasis supplied.)

Here, as in the present case, the parties claimed the effect of the railroad's contract was coercive in violation of Section 2, Third. However, this Court treated the whole matter as a jurisdictional dispute, the opinion stating at p. 344:

"We see no reason for differentiating this jurisdictional dispute from the others."

No useful purpose could be served by granting of certiorari in this case. The Court of Appeals for the District of Columbia in granting the motions to dismiss clearly followed the mandate of this Court in the *Switchmen's Union, M-K-T and Sou. Pac.* cases. That this Court intended these decisions to finally settle the matters involved in the present case can hardly be disputed.¹¹

That the door was finally locked, even where a right given by the Act was claimed to be denied, appears overwhelmingly clear by this Court's decision in the *Brotherhood of Railway and Steamship Clerks v. United Transport Service Employees*, where it was pointed out in the opinion of the Court of Appeals for the District of Columbia, 137 Fed. 2nd, at p. 819, that

"The employer's refusal in this case to deal with the only labor organization these employees could join and that they did designate as their representative certainly violates both the spirit and the letter of the Fourth paragraph of Section 152."

¹¹ In the *Switchmen's* case the Court of Appeals reviewed and upheld the Board's certification, which the Supreme Court reversed on jurisdictional grounds, the effect being to leave undisturbed the Board's original certification.

The appellate court at page 819 in upholding the District Court's reversal of the Board's certification stated as follows:

"We are constrained to hold, therefore, that the Board misinterpreted the law applicable to the facts in this case and that its order dismissing appellee's application to be certified as the bargaining agent for the employees concerned, was contrary to law."

This Court, however, decided the matter on December 6, 1943 (No. 435, 320 U. S. 715) which is quoted in full as follows (*per curiam*):

"The petition for writ of certiorari is granted and the judgment is reversed on the authority of General Committee of Adjustment vs. Missouri-Kansas-Texas Railroad Co., 320 U. S. 323; General Committee of Adjustment v. Southern Pacific Company (General Grievance Committee v. General Committee of Adjustment), 329 U. S. 338; and Switchmen's Union of North America v. National Mediation Board, 320 U. S. 297, decided November 22, 1943."

On January 10, 1944, the Supreme Court denied a petition for rehearing (No. 435, 320 U. S. 816).

CONCLUSION.

No valid reasons have been shown for the granting of certiorari in this case.

It is therefore respectfully submitted that the petition should be denied.

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APPENDIX.

The pertinent provisions of the Railway Labor Act of 1926, 45 Stat. 477, as amended in 1934, 48 Stat. 1185, 45 U. S. C., Secs. 151, *et seq.*, read as follows:

Section 2. * * *

Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

* * * * *

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representa-

tives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than \$1,000 nor more than \$20,000 or imprisonment for not more than six months, or both fine and imprisonment; for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States. *Provided*, That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to

make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

FUNCTIONS OF MEDIATION BOARD

"Sec. 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused. * * *

"Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1944.

No. 200.

ORDER OF RAILWAY CONDUCTORS OF AMERICA,
H. W. FRAZER, AS PRESIDENT OF THE ORDER OF RAILWAY
CONDUCTORS OF AMERICA, ETC., ET AL.,
Petitioners,

vs.

THE PENNSYLVANIA RAILROAD COMPANY AND
BROTHERHOOD OF RAILROAD TRAINMEN,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA.

**BRIEF FOR RESPONDENT, BROTHERHOOD
OF RAILROAD TRAINMEN.**

BERNARD M. SAVAGE,
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hood of Railroad Trainmen.



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OF RAILROAD TRAINMEN.**

OPINIONS BELOW.

The *per curiam* opinion of the United States Court of Appeals for the District of Columbia reported in 141 F. (2d) 366 will be found in the printed record at R. 113-116 and the judgment and order of the District Court (D. C.) at R. 89.

JURISDICTION.

The jurisdiction of this Court is invoked by the petitioners under Section 240 (a) of the Judicial Code as amended. The judgment of the Court of Appeals was entered March 27, 1944 (R. 116). The petition for certiorari was filed August 29, 1944, and granted October 9, 1944.

STATUTE INVOLVED.

The statute involved is the Railway Labor Act, as amended June 21, 1934 (c. 691, 48 Stat. 1185, 45 U. S. C. Sec. 141, *et seq.*). The pertinent provisions of the Act are set forth in the Appendix, *infra*, to this brief.

COUNTERSTATEMENT.

The petitioners' writ of certiorari was granted to review the judgment of the United States Court of Appeals for the District of Columbia entered in this cause on March 27, 1944, dismissing the petitioners' appeal as to the Pennsylvania Railroad Company (hereinafter called Pennsylvania) and the Brotherhood of Railroad Trainmen (hereinafter called BRT). No review is sought of the Court of Appeals' judgment in so far as it dismissed the petitioners' appeal as to the National Mediation Board and its members.

The separate motions to dismiss filed by each appellee were based upon the three following cases decided by this Court on November 22, 1943; subsequent to the petitioners' appeal and before argument. *General Committee of Adjustment v. Missouri-Kansas-Texas Railroad Co.*, 320 U. S. 323, *General Committee of Adjustment v. Southern Pacific Company* (*General Grievance Committee v. General Committee of Adjustment*) 320 U. S. 338, and *Switchmen's*

Union of North America, et al., v. National Mediation Board, Brotherhood of Railroad Trainmen, et al., 320 U. S. 297.

The appeal was taken from the judgment and order entered on June 11, 1943 by the District Court of the United States for the District of Columbia dismissing petitioners' complaint, amended complaint and denying motion for summary judgment (R. 89). The petitioners' (Order of Railway Conductors, an unincorporated association, and four of their officers, hereinafter referred to as ORC) original complaint filed on November 25, 1942, asked for declaratory and injunctive relief against the Pennsylvania and the BRT but the Board or its members were not made parties defendant. The amended complaint which added the Board and its members as parties defendant was filed on January 7, 1943, and attempted to have set aside an election conducted by the Board among the road conductors on the Pennsylvania lasting from December 5 to December 19, 1942, and also sought to set aside the Board's certification of December 27, 1942 (par. 45, R. 20):

"That the Brotherhood of Railroad Trainmen has been duly designated and authorized to represent the craft or class of road conductors employed by the Pennsylvania Railroad for the purposes of the Railway Labor Act." (R. 75-76).

In addition it sought to enjoin the Board from holding any other election until it found that certain alleged practices did not constitute unlawful influence or coercion within the meaning of the Railway Labor Act and further prayed that in the alternative the court declare that the practices complained of against the Pennsylvania Railroad constituted unlawful interference, influence or coercion and asked that the defendant Mediation Board be enjoined from holding an election, etc., until after the Board finds

that such alleged interference, influence, etc., has ceased. The court was also asked to declare, that certain contractual provisions entered into by the Pennsylvania R. R. and the BRT prior to the election be declared void because covering road conductors allegedly included in the ORC's contract, and that the ORC be declared as the accredited representative of the conductors, to have the exclusive right to negotiate and bargain collectively for the road conductors (R. 20-21-22).

The amended bill of complaint and record show the following. In April of 1927 the ORC representing Pennsylvania road conductors, Pennsylvania and BRT entered into a joint schedule or contract, which was entered into jointly because the work of road conductors and road brakemen were closely related; the BRT for a long time represented road brakemen, yard conductors, yard brakemen, baggage-men and switch tenders (Amended Complaint, hereinafter referred to as A. C., par. 11, R. 5).

On April 18, 1941, Pennsylvania served notice upon the ORC and BRT in compliance with the Railway Labor Act of its desire to change certain regulations. Joint conferences pursuant thereto were held beginning May 1941, but shortly thereafter were held in abeyance by consent and resumed July 15, 1942 continuing (par. 12, A. C., R. 5-6) until petitioner, ORC, served written notice of its withdrawal dated August 3, 1942 (Exhibit B, R. 121 and par. 14, A. C., R. 7).

On August 14, 1942, Pennsylvania and BRT signed an agreement covering yard conductors, road and yard brakemen, baggage-men, assistant conductors or ticket collectors and switch tenders, which contract included paragraph

Road and yard brakemen, baggage-men and switchtenders were and are admittedly represented by the BRT (A. C., par. 11, R. 5).

- P-A-1 covering assistant conductors or ticket collectors² (Par. 15, A. C., R. 7-8) and par. 5. N-5 and 5. N-6 (R. 9-10-11) covering the displacement of brakemen, baggagemen and switchtenders by road conductors on the extra list.

Sub-paragraph (a) of 5. N-6 (A. C., par. 17, R. 11) specifies the manner of calling employees admittedly represented by the BRT for conductor vacancies when regular or extra conductors are not available.

On September 23, 1942, the BRT filed an invocation with the National Mediation Board asking that they be certified as the representative for the road conductors, which invocation was accompanied by the required authorizations (A. C., par. 34, R. 17 and R. 20).

On October 28, 1942, the ORC addressed a letter to the Mediation Board which purported to state in detail the events leading up to the invocation and the allegation of coercion and influence (R. 23 to 33). This letter also objected to the holding of an election during war time because a large number of men, who formerly worked as brakemen and baggagemen, were then working as promoted conductors and upon termination of the emergency would go back to brakemen, flagmen and baggagemen. This paragraph 4, beginning at R. 31, concludes at page 32 (R).

"An election at this time would place the balance of power with men whose positions as conductors will terminate at the end of the war."

On November 9, 1942, the Board replied to the ORC's letter and detailed the Board's reasons for finding it was

² Although alleged (pet. 5) a new class of employees created and included in contract of August 17, 1942, viz. assistant conductors, rates of pay for this class were specified on p. 11 of joint contract between Pennsylvania, BRT and ORC April 1, 1927 (R. 124).

not empowered to hold a formal hearing but invited a discussion with the plaintiff (R. 33 to 40). This discussion took place on November 13, 1942 (A. C., par. 38, R. 18).

On November 20, 1942, the ORC representatives agreed with the BRT representatives and the Mediation Board in writing that

*"To settle the dispute, should the National Mediation Board find that a dispute exists among the Road Conductors, employees of the Pennsylvania Railroad, and order an election, the eligible list of such Road Conductors entitled to vote in such an election shall be: * * *". (BRT Ex. D, R. 83-84-85),*

and on December 2, 1942, agreed in writing to the list of eligible voters to be used in conducting an election by the Board (BRT Ex. E, R. 85-86), and on December 19, 1942, agreed that the election conducted by the Mediation Board from December 5, 1942, to December 19, 1942, which showed 3,283 eligible voters of whom 1,122 voted for the ORC and 1,680 for the BRT, *was conducted in a fair and impartial manner and the secrecy of the ballots was kept inviolate to which said ORC representatives attested in writing (BRT Ex. F, R. 86-87-88);* accordingly on December 27, 1942, the Board certified the BRT as the representative of the road conductors (R. 75-76).

On January 7, 1943 (3¹/₂ months after the BRT invocation) four ORC officers filed an Amended Bill of Complaint for declaratory and injunctive relief against the Pennsylvania, the BRT and for the first time made the Mediation Board and its members parties defendant. After answers were filed by all parties, the ORC on March 8, 1943, made a motion for summary judgment (R. 65-66-67) to which answers were filed by all parties and on June

* BRT invocation filed with Board September 23, 1942 (R. 17).

11, 1943, the following judgment and order was entered by the District Court (R. 89):

"The above-entitled case, having come on for hearing on plaintiff's motion for a summary judgment; and the Court having considered the motion, defendants' answers thereto, affidavits of the parties, the pleadings and oral argument of counsel; and the Court being of the opinion that there is no genuine issue as to any material fact with respect to the relief requested under the motion for summary judgment, but the Court being of the further opinion that the facts admitted as true and all other facts alleged in the complaint and amended complaint of the plaintiffs, do not establish that the plaintiffs have any cause of action; it is by the court this 11th day of June, 1943

ADJUDGED, ORDERED AND DECREED:

1. That the plaintiffs' motion for a summary judgment be and the same is hereby denied;
2. That the complaint and the amended complaint be and the same are hereby dismissed;
3. That costs are awarded to defendants.

/s/ DANIEL W. O'DONAGHUE,

June 11, 1943

Justice."

From the District Court's action the ORC appealed to the Court of Appeals for the District of Columbia.

After briefs had been filed in this appeal, but before argument, the Supreme Court decided the *M-K-T, Southern Pacific* and *Switchmen's* cases, *supra*, which furnished the basis for three separate motions to dismiss the appeal, one filed by each appellee, the present respondents. The petitioners state (Brief 8):

* * * "Consistently with this concession, the petitioners acknowledged that the motion to dismiss the appeal as against the Board probably should be granted."

The Court of Appeals ordered printed briefs filed by all parties and held a hearing on the motions to dismiss on February 17, 1944. The three separate motions were granted, but the petitioners did not ask certiorari as to the Court's action in granting the Board's motion to dismiss.

The appellate Court based its dismissal on three grounds: first: That under the *Switchmen's* case the Federal Courts lacked jurisdiction to review in any respect the action of the Board in jurisdictional representative disputes; second: that even though there were allegations of influence affecting the electors, after the certification was made by the Board, the *Switchmen's* decision, *Brotherhood v. United Transport Service Employees* (320 U. S. 715), *M-K-T* and *Sou. Pac.* cases, foreclose the question presented and deprive the Courts of all rights of interference, and third: that the relief then being sought was bootless in the present situation.

QUESTIONS PRESENTED.

1. Does the District Court have the power to annul a certification of the Mediation Board after an election conducted by it in an admittedly fair and impartial manner, upon allegations of conduct alleged to have influenced voting employees in their choice of a representative, when these identical charges were presented to the Board by the petitioners and when remedies provided by the Railway Labor Act, were unused by the petitioners?

2. Whether or not in view of the decisions in the *Missouri-Kansas-Texas* case, the *Southern Pacific* case and the *Switchmen's Union* case to the effect that the determination by the Board is conclusive and that jurisdictional disputes between labor organizations do not present justiciable issues under the Railway Labor Act, the action of the

Court of Appeals in dismissing the petitioners' appeal is correct?

3. Is the present case in substance anything but a jurisdictional controversy?

4. Does the District Court have jurisdiction to annul the Board's certification when the Court admittedly does not have the power to review the action of the Board and when the Board is no longer a party to the proceedings, the petitioners having raised no objection to the correctness of its dismissal by the appellate court?

SUMMARY OF ARGUMENT.

It is believed by Respondent BRT, that the present case arises as a result of an effort on the part of the Petitioners to postpone an election under the Railway Labor Act, until after the war, because a large number of employees have been advanced in their normal course, from brakemen to conductors, the brakemen being represented by the BRT. The petitioners state in their letter of October 28, 1942, to the Board R. 32:

"an election at this time would place the balance of power with men whose positions as conductors will terminate at the end of the war."

It is not claimed by anyone, that there is any provision in the Railway Labor Act for postponing elections until one of the parties to a representation dispute, is in a more favorable position than the other, whether it be because of the war emergency or any other reason.

That a substantial majority of road conductors, (1,680 for BRT, 1,122 for ORC) in an election conducted by the Mediation Board in an admittedly fair and impartial manner, are entitled to a representative of their own selection, is one of the basic principles of the Railway Labor Act.

The petitioners in their effort to defer the election and dignify their reasons for so doing, filed a Bill of Complaint (later amended) covering twenty two pages of the record which, viewed in the light most favorable to the petitioners, presents nothing but a jurisdictional dispute, namely, the question as to whether or not the petitioners have *exclusive* jurisdiction over assistant conductors or ticket collectors and as to whether or not the ORC has *exclusive* jurisdiction over the control of the so-called "extra board".

After this court's decision in the *Switchmen's Union* case; *M-K-T* and *Southern Pacific* cases, which the petitioners admit, conclusively determine that proceedings before the Mediation Board in a certification matter, are not subject to review and that jurisdictional controversies do not present justiciable issues, the petitioners attempt to circumvent the allegations of their Bill of Complaint showing the basis of the present case to be a jurisdictional dispute, by emphasizing that the Pennsylvania refused conferences with the ORC, after ORC had withdrawn from joint negotiations which had been in progress; that the Pennsylvania settled seventy-five percent of claims which were pending before the Railroad Adjustment Board by BRT brakemen and proceed to make the argument that the effect of these two acts on the part of the Pennsylvania, was to coerce and influence the road conductors in their choice of a representative; although the petitioners admitted in writing that the election was conducted in a fair and impartial manner.

Apparently being unable to convince even themselves that the two acts complained of could be said to be coercive, in view of the fact that the settlement of claims is one of the underlying purposes of the Railway Labor Act, and that a specific remedy existed if the Pennsylvania was delaying or refusing conferences, the petitioners then pro-

ceed to announce that even if the decisions in the three cases referred to, preclude the court's consideration of jurisdictional matters, if the consideration of jurisdictional questions is incidental, but necessary to a decision in the instant case, the courts would have this authority.

Realizing that even this argument is unsound the petitioners then proceed to the argument that, but for the court's intervention their rights would be sacrificed and obliterated, without explaining why they did not avail themselves of the many remedies afforded by the Railway Labor Act for their alleged grievances.

Since the specification of one remedy normally excludes another (*Switchmen's Union* case, 320 U. S. at p. 301) and in view of the admitted effect of the three decisions referred to, it is obvious that the District Court was correct in dismissing the amended Bill of Complaint and the action of the Court of Appeals in dismissing the appeal was clearly right.

ARGUMENT.

I.

The Courts have no jurisdiction under the *Switchmen's Union* decision to strike out the Board's certification, even though judicial consideration be asked of a part of the matter, which the Board ruled it had no jurisdiction to consider.

It is the petitioners' contention even though admitting the Mediation Board's action in certifying the BRT cannot be reviewed, that because the Mediation Board ruled it had no jurisdiction to consider alleged coercion ante-dating the election, the Court can consider this and if found to exist and to have influenced the conductors in their choice, can strike out the certification. This argument is apparently based upon the theory that without the Court's inter-

vention the Petitioners' "right" under Section 2, Third, would be "sacrificed or obliterated".

In the *Switchmen's* case the petitioners sought to have the determination by the Board of the participants and the certification of representatives cancelled.

"But in addition an injunction against the Brotherhood and the carriers was asked to restrain them from negotiating agreements concerning the craft of yardmen on the carriers' lines." (320 U. S. at p. 310).

This relief was asked by the Switchmen because it was alleged they were forced to participate in an invalid carrier-wide election. The Board had held that the

"Railway Labor Act vests the Board with no discretion to split a single carrier or combine two or more carriers for the purpose of determining who shall be eligible to vote for a representative of a craft or class of employees under Section 2, Ninth, of the Act, and the argument that it has such power fails to furnish any basis of law for such administrative discretion." (320 U. S. at p. 309).

The Court of Appeals reviewed the matter on its merits and it was pointed out by Mr. Justice Rutledge in the dissenting opinion (135 Fed. 2nd, at p. 802):

"In my opinion the Board, when it decided as a matter of law that the statute requires carrier-wide crafts as the voting unit, whenever the dispute raises that question, failed to exercise the judgment which the statute calls into play"

In this situation this Court could have reviewed the Board's decision or could have sent the matter back to the Board in order that it might have exercised its discretion to determine the craft or class on less than a carrier-wide basis. Instead, however, this Court reversed and held at 320 U. S. p. 300:

"We do not reach the merits of the controversy. For we are of the opinion that the District Court did not have the power to review the action of the National Mediation Board in issuing the certificate."

The opinion further found at pages 300 and 301:

"The Act, Section 2, Fourth, writes into the law the 'right' of the 'majority of any craft or class of employees' to 'determine who shall be the representative of the craft or class for the purposes of this Act' that 'right' is protected by Section 2, Ninth, which gives the Mediation Board the power to resolve controversies concerning it and as an incident thereto to determine what is the appropriate craft or class in which the election should be held. (emphasis supplied.)

" * * * A review by the Federal District Courts of the Board's determination is not necessary to preserve or protect that 'right'. Congress for reasons of its own, decided upon the method for the protection of the 'right' which it created. It selected the precise machinery and fixed the tool which it deemed suitable to that end. Whether the imposition of judicial review on top of the Mediation Board's administrative determination would strengthen that protection is a considerable question. All constitutional questions aside, it is for Congress to determine now the rights which it creates shall be enforced. * * * *In such a case the specification of one remedy normally excludes another*". (emphasis supplied).

There is little if any distinction in the proposition urged in the case at issue and the *Switchmen's* case where the Board ruled that it had no discretion to split a carrier for the purpose of recognizing groups who had bargained under one contract for a long period of years as a separate class or craft, and the present case where the Board ruled it had no jurisdiction to consider coercion ante-dating the actual holding of an election. Since this Court in the *Switchmen's* case considered that the right was given

under Section 2, Fourth, to have designated the appropriate crafts or class, incident to whom might participate in an election under this Section, and if it considered that the Board failed to exercise its duty on the theory that it had no jurisdiction "to split a carrier" this court, should the petitioners' theory be correct, would have permitted the Federal Court to have considered the right given by Section 2, Fourth.

This Court held, however, at page 303:

"Where Congress took such great pains to protect the Mediation Board in its handling of an explosive problem, we cannot help but believe that if Congress had desired to implicate the federal judiciary and to place on the federal courts the burden of having the final say on any aspect of the problem, it would have made its desire plain".

and this Court held further at page 305:

"Under this Act Congress did not give the Board discretion to take or withhold action, to grant or deny relief. It gave it no enforcement functions. It was to find the fact and then cease. Congress prescribed the command. *Like the command in the Butte Ry. case it contained no exception. Here as in that case the intent seems plain—the dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law.*" (Emphasis supplied).

II

The decisions in the M-K-T and Southern Pacific cases conclusively determine that the issues presented in this case, are not justiciable.

It is claimed by the petitioners that the effect of the Pennsylvania's dealing with the DRT as to road conductors was coercive, in violation of Section 2, Third.

This Court in the *General Committee, etc., v. Southern Pacific*, 320 U. S. at p. 342, states as follows:

"They point out that Section 2, *Third* and *Fourth* prohibit the carrier from *influencing employees in their choice of representatives*. The argument is that a contract by the carrier with the Engineers, giving the latter the exclusive right to represent engineers in the presentation of their individual claims, would in effect *coerce* all engineers into joining that union in violation of *Section 2, Third and Fourth*." (emphasis supplied.)

After discussing the history of the Act, this Court said at p. 342:

"All of these would be relevant data for construction of the Act if the courts had been entrusted with the task of resolving this type of controversy. But we do not think they were. * * * For the reasons stated in our opinions in the *Missouri-Kansas-Texas R. Co.* case and in the *Switchmen's* case, we believe that Congress left the so-called jurisdictional controversies between unions to agencies or tribunals other than the courts. We see no reason for differentiating this jurisdictional dispute from the others."

This Court held that the "right" given by Section 2, *Fourth*, is protected by Section 2, *Ninth* and a review by the Courts of the Board's determination is not necessary to protect that "right", *Switchmen's* case, 320 U. S. at 300-301. Since Section 2, *Ninth*, authorizes the Board to

"* * * to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence or coercion exercised by the carrier"

the right claimed by the petitioner under Section 2, Third, is protected by Section 2, Ninth and a determination by the Courts is not necessary to preserve or protect that right. It is claimed by the petitioner in the present case and pointed out in the *Switchmen's* case that these "rights" were not considered by the Board—in the *Switchmen's* case because the Board ruled it had no discretion to 'split a carrier' and in the present case because the Board ruled it had no jurisdiction to consider alleged coercion ante-dating the holding of an election.

Indeed the petitioners had additional means of protecting that right by proceeding under Section 2, Tenth and since it was claimed that coercion resulted because of the failure of the Pennsylvania to deal with them as the exclusive representative of road conductors as well as delaying conferences, the petitioners could have invoked the services of the Mediation Board under Section 5, First. (BRT appendix.)

III.

The Board's certification of the B. R. T. as the representative for the road conductors which admittedly is not subject to review leaves the petitioners who filed the Amended Bill of Complaint, representing no one but themselves and therefore having ceased to represent the employees involved, the charges of coercion and influence are now moot.

The Court of Appeals besides determining (R. 114) that under the *Switchmen's* case the Federal Courts lacked jurisdiction to review in any respect the action of the Board in jurisdictional representative disputes and that in the case of *Brotherhood v. United Transport Service Employees*^{3a} the Supreme Court went further and extended the

^{3a} 320 U. S. 715.

prohibition against judicial review to cases where the action of the Board was said to be clearly arbitrary, held as follows (R. 115):

"The prayer for injunctive relief against the Railroad, growing out of its alleged policy of coercion, which counsel continue to press, even if it be conceded the District Court has jurisdiction to grant the relief asked, would be bootless in the present situation, since it is not alleged that coercion is continuing now, for the dispute which it is claimed gave it birth is over and done with, the controversy conclusively ended and put to rest by the Board's certification, and there is no reason to suppose there will be another request for an election".

It cannot be denied that the ORC and the four officers, who filed the amended bill of complaint have standing in this court only as the representative of the road conductors, however since by virtue of the certification the BRT represent the road conductors the petitioners have no standing to complain. An examination of the Railway Labor Act clearly shows that the only rights conferred, are those upon employees and since the BRT is now representing these employees, the petitioners cannot appear in a representative capacity.

Particularly is this true since the petitioners raised no objection to the Board's motion for dismissal and the Board is no longer a party to the proceedings. The claim that the Courts have jurisdiction to strike out an election and certification proceeding conducted, by the Board, the investigation lasting from November 2, 1942 (R. 40) to December 2, 1942, and the election itself lasting from December 2, 1942, to December 19, 1942, inclusive (R. 86) involving the eligibility of thousands of employees and the secret polling of thousands of employees all over the Pennsylv-

vania Railroad without the Board being a party to the attempted certification annulment, presents a most unusual situation and were it to be allowed in this case a precedent would be established, which would tend to defeat the purposes of the Railway Labor Act.

If the ORC deems that the election was held at a time when the balance of power was with respondent, BRT, because a large number of brakemen represented by the latter organization were working as conductors due to the heavy increase in traffic, they have a right, should they so desire, to invoke the services of the Mediation Board for the purpose of holding another election but until they are certified by the Board as representing the road conductors, the ORC under the *Switchmen's* decision has no standing to complain on behalf of employees they do not represent.

IV.

The allegations of the Amended Bill of Complaint present in essence, nothing but a jurisdictional controversy.

The petitioners being unable to escape the clear cut and definite language of the *Switchmen's* decision have finally conceded that the Courts have no jurisdiction to review the action of the Mediation Board in a certification proceeding.

They correctly interpret the decision of the Court of Appeals in the present case as one involving a jurisdictional dispute (Brief 14).

The Court of Appeals identified the instant case as one involving a 'jurisdictional dispute' (141 F. (2d) at 366, 367; R. 113, 114), and stated that this Court's decision in the above cases required the petitioners' appeal to be dismissed for lack of jurisdiction (141 F. (2d) at 367; R. 115).

The petitioners admit that if a decision of the jurisdictional question, namely, one of the Pennsylvania's dealing with the BRT as to assistant conductors and ticket collectors and the maintenance of an extra board, was the basis of the petitioners case, the Court under the *M-K-T* and *Southern Pacific* cases, would not have jurisdiction; they seek to escape this inevitable conclusion by the suggestion that if the jurisdictional determination is merely incidental but nevertheless necessary the cases¹ referred to, do not preclude judicial intervention.

It is stated by petitioner (Brief page 14)

"The basis for the Court of Appeals' view that this case involves merely a jurisdictional dispute is not explained in its *per curiam* opinion."

That an explanation of a fact so obvious is not required, is attested by the petitioners themselves when they are able to cite only the following from their amended bill of complaint and letter to the Board covering 33 pages of the printed record, to show that the instant case is anything other than a jurisdictional dispute.

They state (Brief 15)

1. The petitioners' amended complaint contains several allegations charging that Pennsylvania interfered with the conductors' choice in other ways than by violating their representative's bargaining jurisdiction.

It is alleged in the amended complaint that Pennsylvania and BRT conspired in an unlawful plan of action designed to weaken ORC and strengthen BRT in their respective standings with the conductors and thereby to interfere with and influence the conductors in their choice of a representative (R. 14), and that Pennsylvania, in pursuance of this plan and

¹ *M-K-T*, *Southern Pacific* and *Switchmen's Union* cases.

"in an effort to promote good will toward the BRT and weaken and discredit the ORC, sought to bring about a settlement of all^s claims filed by the BRT before the First Division of the National Railway Adjustment Board, and published and gave wide circulation to its proposed settlement * * *." (R. 15);

that Pennsylvania

"agreed to the said unlawful plan of action or program to obtain substantial financial advantage * * * and to secure a commitment from the BRT to adjust time claims of road brakemen, pending before the First Division of the National Railway Adjustment Board, at greatly reduced amounts." (R. 16-17);

and that, in pursuance of the aforementioned plan, Pennsylvania

"has engaged in dilatory tactics, has failed and refused to bargain and negotiate in good faith with ORC, * * * and is intentionally delaying negotiations with ORC to grant the BRT an opportunity to invoke the services of the Board under the provisions of the Railway Labor Act for a certification to represent the class or craft of road conductors and to obtain an election in such class or craft at a time when the working conditions of the conductors are in a state of uncertainty; and that the unlawful failure and refusal of the Penn RR to bargain and negotiate is embarrassing the ORC with its members." (R. 15-16)

It is hardly deemed necessary to make an extended argument on the proposition that the settlement of claims filed before the Railroad Adjustment Board, under the provisions of the Railway Labor Act, could be held to have a coercive effect sufficient to interfere with the voting will of railroad conductors. If this were true no railroad

⁸ It is stated by the Petitioners (p. 93 of Brief) that the respondent, Pennsylvania, agreed to pay only 75% of these claims pending before the Railway Adjustment Board.

would be safe in settling claims of this nature, even though meritorious and properly filed under the Railway Labor Act, because of the possibility that it would be claimed the effect of settlement of these claims was coercive. Such a construction would obviously run counter to the entire intent of the Railway Labor Act and specifically the provisions relating to the Railroad Adjustment Board.

Indeed the fact that such an allegedly large number of these claims existed, is further proof of the fact that the present case is nothing but a jurisdictional dispute, in that brakemen admittedly represented by the BRT were called upon to perform duties over a long period for which pay was claimed, because said extra duties were those of the assistant conductors or ticket collectors over which the petitioner, ORC, claim exclusive bargaining right. This claim is of course denied by the BRT because the bulk of the duties of assistant conductors are those of brakemen, admittedly represented by the BRT.

As to the second allegation that the BRT engaged in dilatory tactics for the purpose of affording the BRT an opportunity to invoke the Board's services in its certification proceeding, it will be noted that the alleged delay consists of only one month's time (R. 15) and this delay was only after the petitioner had voluntarily withdrawn from joint conferences.

However the petitioners had a remedy if the Pennsylvania was delaying negotiations by invoking the terms of the Mediation Board under Section 5 First providing that any party to a dispute may invoke the services of the Mediation Board in any of the following cases:

" * * * (b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused. * * * (emphasis supplied)

For reasons best known to themselves the petitioners never invoked the services of the Mediation Board under this provision.

It is therefore perfectly obvious that the Court of Appeals labeled the instant case as nothing but a jurisdictional dispute because it was the only logical conclusion they could have reached.

It is claimed by the petitioners (Brief p. 18) that any act by the carrier which it is under no legal duty to do and which in fact interferes with or influences employees in their choice of a representative, constitutes carrier interference or influence. The question as to whether or not it is under a *legal duty* to treat with the BRT as the representative of assistant conductors necessarily involves a jurisdictional question. The petitioners argue (Brief 19)

"The fact but for the prohibition against carrier interference in Section 2 Third Pennsylvania's action was lawful, is of no significance; it is no defense to the charge of carrier interference that Pennsylvania's actions did not violate ORC's jurisdiction as to conductors' bargaining agent."

Such reasoning would make it a violation of Section 2 Third for the carrier and the employees' representative to negotiate with employees, even though not involving the infringement of jurisdiction, should the effect of such negotiations and resulting contracts lead some of the employees to the conclusion, that the union representatives negotiating a contract were good bargaining agents. This sort of argument is hardly convincing, which even the petitioners seem to realize by finally stating (Brief 19):

"Even if this court should rule that the district court would have to determine whether Pennsylvania's action with respect to the conductors' extra board and the assistant conductors violated ORC's jurisdiction in

order to decide whether that action interfered with the conductors' choice, it does not necessarily follow that the M-K-T and Southern Pacific decisions would preclude the district court from making such a determination."

These cases clearly hold to the contrary.

V.

The Petitioners' argument that without the District Court's intervention and annulment of the Board's certification, their rights would be "sacrificed or obliterated" is unsound.

It is asked by the Petitioners (Brief 29)

"In these circumstances, what measures could have been taken by ORC to enforce the road conductors' right to a free choice?"

While it is, of course, denied that the right of free choice was in any way influenced but assuming for the sake of argument that the effect of such conduct was coercive and interfered with right of free choice in violation of Section 2 Third,

1. They could have filed the suit any time after August 3rd, 1942 when the Pennsylvania first is alleged to have interfered, to enjoin further acts of interference.
2. Since it was alleged that the Pennsylvania was delaying negotiations in refusing to confer with the petitioners, they could have invoked the services of the Mediation Board under Section 5 First, sub-paragraph (b) which states the Board's services may be invoked in any of the following cases:

* * *

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted

in conference between the parties or where conferences are refused."

* * *

3. They could have applied to any United States District Attorney to have criminal proceedings brought against the Pennsylvania Railroad in accordance with Section 2 Tenth of the Act.

4. They could have refrained from their childish withdrawal from joint conferences because of the alleged desire on the part of the BRT to exercise joint control over the conductors' extra board and the BRT's alleged desire to negotiate with the Pennsylvania as to assistant conductors or ticket collectors and could have invoked the services of the Board under Section 5 First, sub-paragraph (a) giving any party the right to do so in any of the following cases:

* * * "(a) A dispute concerning changes in rates of pay, rules or working conditions not adjusted by the parties in conference."

5. They could have promptly invoked the services of the Mediation Board after their withdrawal on August 3rd, 1942, instead of waiting until October 28, 1942, or approximately 85 days after the alleged coercion began before writing the Board and 35 days after the BRT had invoked the services of the Mediation Board to be certified as its representative of the road conductors.

6. They could have filed mandamus proceedings against the Board requiring it to hold the hearing to determine whether or not negotiations or agreements between the BRT and Pennsylvania were in fact coercive instead of waiting until January 7, 1943, before making the Board and its members party defendants or three and one-half months after the BRT's invocation of the Board's services on September 23, 1942, and five months after the ORC's notice of withdrawal to the Pennsylvania.

It is no defense to say that the Courts would not have granted mandamus because interfering with the administrative functions of the Board because, it was alleged that the Board failed to perform its administrative duties.

It was not claimed there were any threats of discharge, revocation of pass privileges, denial of seniority, or in fact threats of any kind; in fact had there been, it is well known to the petitioners that the road conductors would promptly have shown their resentment by voting for the bargaining representative not favored by the Pennsylvania knowing that the secrecy of their ballots would have remained inviolate.

It is probably true that the ORC and four of its officers, who filed the amended bill of complaint, were disappointed at the results of the election because the respondent, BRT, was selected by a vote of 1,680 to 1,122 but, by merely saying that what, even taken from the most favorable standpoint, is nothing but a jurisdictional dispute and labeling it coercion cannot upset the will of a substantial majority of the Pennsylvania road conductors, who wanted the BRT as their bargaining agent and who have said so in a secret election fairly and impartially conducted.

THE PETITIONERS ARE NOT ENTITLED TO THE RELIEF ASKED IN THEIR "CONCLUSION".

In the "Conclusion" to Petitioners' Brief (page 31) they state:

"It is submitted that the judgment of the Court of Appeals should be reversed and the cause remanded to that Court with instructions to enter a judgment reversing the judgment of the district court dismissing the amended complaint for failure to state a cause of action."

Since petitioners in their brief do not touch on the type of relief asked under this heading, it is assumed that relief asked is an oversight, because the Court of Appeals disposed of the case, by granting all three motions to dismiss, without considering the question of validity of the District Court's dismissal of the amended bill of complaint, for failure to state a cause of action (R. 89).

CASES RELIED UPON BY PETITIONERS.

The petitioners contend that the decision of the Court of Appeals is contrary to the decision in *Virginian Railway v. Federation*, 300 U. S. 515, and *Texas & N. O. R. Co. v. Ry. Clerks*, 281 U. S. 548. They further state that the decision of the Court of Appeals does not give proper effect to the decision of this Court in the *Switchmen's case*, *General Committee v. M-K-T R. Co.* and *General Committee v. Sou. Pac. Co.*

An analyzation of the *Texas v. Ry. Clerks* case which was decided first in point of time (May, 1930) shows² that the clerks' organization was recognized by the railroad as representing a majority of the clerks from the time of its organization in 1918 until after the clerks organization made application for an increase in wages. After the Texas denial of a wage increase the clerks referred the matter to the Mediation Board and while the matter was pending before the Board the railroad instigated the formation of a rival organization. Even though the District Court granted a temporary injunction, the railroad company thereafter recognized the so-called union formed by it and refused to recognize the Clerks' organization. The matter came up on a contempt proceeding against the railroad and certain of its officers, and on final hearing the temporary injunction was made permanent, and a motion to vacate the order

² * Facts given in Court's Opinion. 281 U. S. 555-556 557-558.

in the contempt proceedings denied; all of which was affirmed on appeal and this Court granted certiorari. Mr. Justice Hughes, who delivered the Opinion of the Court, pointed out (p. 560) that those employees soliciting authorizations for the association sponsored by the railroad were permitted to devote their time to that enterprise without deduction from their pay and charge their expenses to the railroad company. They made reports of their progress to the company and as stated in the opinion at p. 560:

" * * * The discharge from the service of the Railroad Company of leading representatives of the Brotherhood and the cancellation of their passes, gave support, despite the attempted justification of these proceedings, to the conclusion of the courts below that the Railroad Company and its officers were actually engaged in promoting the organization of the Association in the interest of the Company and in opposition to the Brotherhood, and that these activities constituted an actual interference with the liberty of the clerical employees in the selection of their representatives. * * *"

The then Chief Justice states in the opinion at p. 568:

"The intent of Congress is clear with respect to the sort of conduct that is prohibited. 'Interference' with freedom of action and 'coercion' refer to well understood concepts of the law. The meaning of the word 'influence' in this clause may be gathered from the context. *Noscitur a sociis*. *Virginia v. Tennessee*, 148 U. S. 503, 519. The use of the word is not to be taken as interdicting the normal relations and innocent communications which are a part of all friendly intercourse, albeit between employer and employee. 'Influence' in this context plainly means pressure, the use of the authority or power of either party to induce action by the other in derogation of what the statute calls 'self-organization'."

The Clerk's case was decided before the 1934 Amendments to the Act empowering the Board to protect the right given under Section 2, Third, by the additions of Section 2, Ninth, and the addition of Section 2, Tenth, providing criminal penalties for the violation of Section 2, Third, etc. But for the injunctions asked of the Court, the Clerk's would have been entirely without remedy even though their leaders were being discharged and their passes taken away for activity in favor of their organization.

This case serves a useful purpose to illustrate that Section 2, Third is not to be construed as interdicting the normal relations and innocent communications between employer and employee.

Nobody is contending in the present case that the Pennsylvania ever threatened discharge or the revocation of pass privileges. Indeed the complaint is based on conversations between Pennsylvania representatives and ORC representatives and the alleged coercive effects caused by the Pennsylvania and BRT agreement as to assistant conductors and the maintenance of the extra board. The latter proposition was almost the identical proposition considered by this Court in the *Sou. Pac.* case.

In the *Virginian Ry. Co. v. System Federation*, as the petitioners point out on page 15 of their brief was a suit brought under the Railway Labor Act as amended in 1934 to compel the carrier to treat with the plaintiff, the *certified representative* of the craft of the carrier's employees as required by Section 2, Ninth, and to enjoin the carrier from interfering with, influencing or coercing its employees in their choice of a representative in violation of Section 2, Third, which relief the District Court granted and was affirmed on appeal.

Mr. Justice Stone pointed out (300 U. S. at p. 539) that the petitioner (Virginian Ry.).

"* * * had failed to treat with the Federation as the duly accredited representative of petitioner's employees; that petitioner had sought to influence its employees against any affiliation with labor organizations other than an association maintained by petitioner, and to prevent its employees from exercising their right to choose their own representative; that for that purpose, following the certification, by the National Mediation Board, of the Federation, as the duly authorized representative of petitioner's mechanical department employees, petitioner had organized the Independent Shop Craft Association of its shop craft employees, and had sought to induce its employees to join the independent association, and to put it forward as the authorized representative of petitioner's employees."

The opinion further states (p. 541):

"Petitioner here, as below, makes two main contentions: First, with respect to the relief granted, it maintains that Section 2, Ninth, of the Railway Labor Act (45 U. S. C. A., Sec. 152, Subd. 9), which provides that a carrier shall treat with those certified by the Mediation Board to be the representatives of a craft or class, imposes no legally enforceable obligation upon the carrier to negotiate with the representative so certified, and that in any case the statute imposes no obligation to treat or negotiate which can be appropriately enforced by a court of equity". * * *

The distinction between the case at issue and the *Virginian* case is obvious. In the latter the Court was deal-

¹ The court found that after the certification by the Mediation Board "The defendant, undertook circulation of a petition addressed to the Board to have this certification altered to deprive its employees of the right to representation by said System Federation, and thereafter did cause the Independent Union to be organized notwithstanding the certification."

² The second contention was the defense based upon the allegation that the shop employees were not engaged in interstate commerce.

ing with a company union and the Virginian, refused to treat with or recognize with the Federation certified by the Mediation Board. In this situation Section 2, Tenth, afforded no remedy because penalties were provided only for the failure of the carrier to comply with the terms of the third, fourth, fifth, seventh or eighth paragraphs of this Section. Section 2, Ninth, which states *inter alia*

"Upon receipt of such certification the carrier shall treat with the representatives so certified as the representative of the craft or class for the purposes of this Act," (emphasis supplied).

was omitted from Section 2, Tenth. It is therefore apparent that without the injunctive relief granted by the equity court, the defense offered by the company that Section 2, Ninth, imposes no legally enforceable obligation upon the carriers to negotiate with the representatives so certified, would have been perfectly good and valid and the entire certification proceeding would have been simply a suggestion to the carrier to treat with the certified representatives.

The petitioners in the *Virginian* case offered no defense to that part of the injunction relating to interference, by pointing out that they would be liable criminally under Section 2, Tenth, for the violation of Section 2, Third, and obviously because of this, the opinion stated (pp. 543-544):

"The prohibition against such interference was continued and made more explicit by the amendment of 1934. Petitioner does not challenge that part of the decree which enjoins any interference by it with the free choice of representatives by its employees, and the fostering, in the circumstances of this case, of the company union. That contention is not open to it in view of our decision in the *Railway Clerks' Case*, *supra*, and of the unambiguous language of Section 2, Third, and Fourth, of the Act, as amended". (emphasis supplied.)

As pointed out the *Clerks* case was decided prior to the passage of Section 2, Tenth.

In referring to the *Clerks* and *Virginian* cases in the opinion in the *Switchmen's* case, Mr. Justice Douglas said at p. 300:

"In those cases it was apparent that but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act. The result would have been the 'right' of collective bargaining was unsupported by any legal sanction. That would have robbed the Act of its vitality and thwarted its purpose." (emphasis supplied.)

That portion of the opinion in the case of *Stark v. Wickard*, 321 U. S. 288, at 306-307, cited by the petitioners in their brief (p. 19) simply reaffirms that under the Railway Labor Act jurisdictional disputes between unions were left by Congress to mediation rather than adjudication, but where rights of collective bargaining, created by the Railway Labor Act, contained definite prohibitions of conduct or were mandatory in form, the Supreme Court enforced the rights judicially. The *Clerks* and the *Virginian* cases were referred to by the opinion as authority for this proposition.

Every contention urged by the Petitioners has been considered and ruled upon by the Supreme Court in the *Switchmen*, *M-K-T* and *Sou. Pac.* cases.

To summarize briefly:

The *Switchmen* claimed they were being denied the right given them under Section 2, Fourth, to "representatives of their own choosing" by the Board's refusal to split the carrier on the ground that it lacked discretion to do so.

It was shown that the merits of "less than carrier wide craft voting" was never determined by the Board.

In the present case the petitioners asked the Court to consider acts alleged to amount to coercion because the Board ruled it had no jurisdiction to consider acts of this nature preceding an election.

In the present case, as in the *M-K-T* case, one of the problems was the calling of employees for emergency service and the firemen as well as the ORC in the present case asked that certain contractual provisions entered into between the railroad and the union be declared void and that each be declared the sole representative.⁹ The only appreciable difference seems to be that in the present case the petitioners claim the effect of these contractual acts were said to be coercive.

Mr. Justice Douglas in tracing the evolution of the 1934 Amendment pointed out the remedies available under Section 5, First (320 U. S. p. 232) relating to a dispute concerning changes in rates of pay, rules and working conditions, not adjusted by the parties in conference.¹⁰

The opinion states (p. 336):

"It is clear from the legislative history of Section 2, Ninth, that it was designed not only to help free the unions from the influence, coercion and control of the carriers but also to resolve a wide range of jurisdictional disputes between unions or between groups of employees. H. Rep. No. 1944, *supra*, p. 2; S. Rep. No. 1065, 73d Cong., 2d Sess., 3. However wide may be the range of jurisdictional disputes embraced within Section 2, Ninth, Congress did not select the courts to resolve them." (emphasis supplied.)

⁹ *M-K-T* Case 320 U. S. 326.

¹⁰ Although this remedy *inter alia* was available to the petitioners and although in their letter of protest to the Board they state (R: 29-30) they intended to use it, for reasons best known to themselves, the ORC never availed themselves of it.

Even though all parties asked judicial interpretation this Court treated the entire matter as a jurisdictional dispute and stated (p. 336):

"It seems to us plain that when Congress came to the question of these jurisdictional disputes, it chose not to leave their solution to the courts."

The opinion distinguished the *Virginian* and *Clerks* cases upon which the petitioners principally rely, as follows (*M-K-T* case, 320 U. S. p. 335):

"In the *Clerks* case and in the *Virginian R. Co.* case the Court was asked to enforce statutory commands which were explicit and unequivocal. But the situation here is different. Congress did not attempt to make any codification of rules governing these jurisdictional controversies."

In the *Sou. Pac.* case, which this Court said (320 U. S. p. 339) involved the same basic question as present in the *M-K-T* case concerning the demotion of engineers to firemen and the calling of firemen for engineers in emergency service with the additional question as to the right of the Firemen to represent men working as engineers in the handling of individual grievances. The opinion states (p. 342):

"They point out that Section 2, Third and Fourth, prohibit the carrier from influencing employees in their choice of representatives. The argument is that a contract by the carrier with the Engineers giving the latter the exclusive right to represent engineers in the presentation of their individual claims would in effect coerce all engineers into joining that union in violation of Section 2, Third and fourth." (emphasis supplied.)

Here, as in the present case, the parties claimed the effect of the railroad's contract was coercive in violation

of Section 2, Third. However, this Court treated the whole matter as a jurisdictional dispute, the opinion stating at p. 344:

"We see no reason for differentiating this jurisdictional dispute from the others."

The Court of Appeals for the District of Columbia in granting the motions to dismiss clearly followed the mandate of this Court in the *Switchmen's Union, M-K-T and Sou. Pac.* cases. That this Court intended these decisions to finally settle the matters involved in the present case can hardly be disputed.¹¹

That the door was finally locked, even where a right given by the Act was claimed to be denied, appears overwhelmingly clear by this Court's decision in the *Brotherhood of Railway and Steamship Clerks v. United Transport Service Employees*, where it was pointed out in the opinion of the Court of Appeals for the District of Columbia, 137 Fed. 2nd, at p. 819, that

"The employer's refusal in this case to deal with the only labor organization these employees could join and that they did designate as their representative certainly violates both the spirit and the letter of the Fourth paragraph of Section 152."

The appellate court at page 819 in upholding the District Court's reversal of the Board's certification stated as follows:

"We are constrained to hold, therefore, that the Board misinterpreted the law applicable to the facts in this case and that its order dismissing appellee's application to be certified as the bargaining agent for the employees concerned, was contrary to law."

¹¹ In the *Switchmen's* case the Court of Appeals reviewed and upheld the Board's certification, which the Supreme Court reversed on jurisdictional grounds, the effect being to leave undisturbed the Board's original certification.

This Court, however, decided the matter on December 6, 1943. (No. 435, 320 U. S. 715), which is quoted in full as follows (per curiam):

"The petition for writ of certiorari is granted and the judgment is reversed on the authority of General Committee of Adjustment vs. Missouri-Kansas-Texas Railroad Co., 320 U. S. 323; General Committee of Adjustment v. Southern Pacific Company (General Grievance Committee v. General Committee of Adjustment), 329 U. S. 338; and Switchmen's Union of North America v. National Mediation Board, 320 U. S. 297, decided November 22, 1943."

On January 10, 1944, the Supreme Court denied a petition for rehearing (No. 435, 320 U. S. 816).

CONCLUSION.

It is therefore respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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APPENDIX.

The pertinent provisions of the Railway Labor Act of 1926, 45 Stat. 477, as amended in 1934, 48 Stat. 1185; 45 U. S. C., Secs. 151, *et seq.*, read as follows:

Sec. 2. * * *

Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

* * * * *

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of rep-

representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. The wilful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than \$1,000 nor more than \$20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall wilfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual em-

ployee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

FUNCTIONS OF MEDIATION BOARD

"Sec. 5. First. The parties, or either party, to a dispute between an employe or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused. * * *

* * * * *

"Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

IN THE
Supreme Court of the United States

OCTOBER TERM, 1944.

No. 200.

ORDER OF RAILWAY CONDUCTORS OF AMERICA, et al.,
Petitioners,

v.

THE PENNSYLVANIA RAILROAD COMPANY AND
BROTHERHOOD OF RAILROAD TRAINMEN;
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR RESPONDENT, THE PENNSYLVANIA
RAILROAD COMPANY.

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**IN THE
Supreme Court of the United States**

OCTOBER TERM, 1944.

No. 200.

**ORDER OF RAILWAY CONDUCTORS OF AMERICA; H. W. FRASER
AS PRESIDENT OF THE ORDER OF RAILWAY CONDUCTORS
OF AMERICA, ET AL., *Petitioners,***

**THE PENNSYLVANIA RAILROAD COMPANY AND BROTHERHOOD
OF RAILROAD TRAINMEN, *Respondents.***

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA.**

**BRIEF FOR RESPONDENT, THE PENNSYLVANIA
RAILROAD COMPANY.**

OPINION BELOW.

The opinion of the Court of Appeals for the District
of Columbia is reported in 141 F. (2d) 306.

JURISDICTION.

The petitioners invoke the jurisdiction of this Court under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C., Sec. 347(a)).

STATUTE INVOLVED.

The statute here involved is the Railway Labor Act, as amended by the Act of June 21, 1934 (45 U. S. C., Sec. 151, *et seq.*). Section 2, first, second, third, fourth, ninth and tenth, the paragraphs specially involved, are set forth in the Appendix to this brief at pp. 1a-4a thereof.

STATEMENT.

This case grows out of a dispute between two railroad unions concerning their so-called jurisdictional bargaining rights. The two unions are the Order of Railway Conductors, petitioners in this case (hereinafter sometimes referred to as the Conductors), and the Brotherhood of Railroad Trainmen, one of the respondents (hereinafter referred to as the Trainmen).

Bargaining Negotiations and Jurisdictional Dispute.

The dispute arose in the course of bargaining negotiations with respect to proposed changes in an agreement, or Schedule of Regulations, which had been agreed upon jointly in 1927 by the Conductors, as the then duly accredited representative and bargaining agent for the class and craft of road conductors, the Trainmen, as the then duly accredited representative and bargaining agent for the class and craft of yard conductors and road and yard brakemen, and The Pennsylvania Railroad Company (R. 5). These bargaining negotiations began in 1941 and

continued up to July 24, 1942, through a series of joint conferences, in which representatives of the Conductors, the Trainmen and the Railroad participated (R. 6). During the course of these negotiations, certain differences developed between the representatives of the Conductors and the representatives of the Trainmen with respect to the provisions which should be adopted to govern the movement of employes into and out of the brakeman class, and with respect to the rules and rates of pay for employes used to assist in the collection of fares on passenger trains and designated as "assistant conductors or ticket collectors" (R. 6-7, 24-25). Both the Conductors and the Trainmen claimed jurisdiction with respect to these matters, the Conductors' organization contending that as representative of the class of road conductors it had the exclusive right to determine the provisions governing these matters and the Trainmen's organization insisting that it had a right to participate in such determinations because the brakemen and baggagemen whom it represented were involved (R. 6-7, 14-15).

Withdrawal of the Conductors.

As a result of these differences between the Conductors and the Trainmen, the Conductors' organization finally withdrew from the joint negotiations, giving written notice to the Trainmen and to the Railroad of its withdrawal on August 3, 1942 (R. 6-7, 21-23). Faced by this refusal on the part of the Conductors to participate further in the joint negotiations, the Trainmen and the Railroad continued the negotiations until they ultimately reached an agreement on or about August 17, 1942, upon new provisions governing the rules, rates of pay and working conditions applicable to the class and craft of employes represented by the Trainmen (R. 7). This new agreement included certain provisions with respect to the designation and duties of assistant conductors or ticket collectors, and also certain provisions with respect to the

movement of employes into and out of the brakeman class (R. 7-11).

Beginning shortly thereafter, on August 27, 1942, representatives of the Conductors and the Railroad engaged in separate negotiations with each other in an endeavor to reach an agreement, but no agreement was reached (R. 16). The failure of the Conductors to reach an agreement with the Railroad resulted from the fact that the Conductors continued to insist that the Railroad agree with them to certain stipulations in conflict with those already incorporated in the agreement with the Trainmen (R. 30). Since the Railroad could not accede to this demand of the Conductors which would have bound the Railroad by two inconsistent agreements, the negotiations with the Conductors ended in a deadlock.

Representation Dispute.

On September 23, 1942, the Trainmen invoked the services of the National Mediation Board for the purpose of determining whether the Trainmen should be certified as the duly accredited representative of the class and craft of road conductors, in place of the Conductors (R. 17). The Conductors protested to the Board against the holding of an election as requested by the Trainmen, stating, among other things, that the position of the Conductors (*i. e.*, the union) had been "prejudiced" by the conclusion of an agreement between the Trainmen and the Railroad and by the information which the employes generally had received to the effect that such an agreement had been concluded; and that therefore an election held at that time would not only interfere with the negotiations then pending between the Conductors and the Railroad but would not be an election held "without interference, influence and coercion exercised by the Carrier" (R. 30). The Board rejected the Conductors' protest, without rendering any formal opinion or decision, but it indicated informally, in a letter to the President

of the Conductors, that the charges of carrier coercion and interference were matters with which the Board was not concerned, since its power and duty with respect to such charges related only to insuring that elections are conducted in such a manner as to enable the employees to make known their choice of a representative without carrier interference, influence or coercion. The Board further pointed out in this letter that "the Railway Labor Act prescribes an exclusive procedure for the protection of employees in the choice of representatives. The provisions of Section 3 as quoted above may be made effective through the application of Section 10 of the Act" (R. 38-39).^{*} The Board concluded by saying that it did not find in the Railway Labor Act any provisions under which the protest could be legally granted, and therefore it would continue with its investigation preparatory to the holding of an election in the manner required by the Act (R. 40).

The Complaint.

Shortly thereafter, on November 27, 1942, the Conductors filed the complaint in the present suit, naming the Trainmen and the Railroad as defendants, and charging that the jurisdictional rights of the Conductors, as representative of the class of road conductors, had been infringed by the negotiations between the Trainmen and the Railroad, from which the Conductors had withdrawn, and by the agreement subsequently entered into between the Trainmen and the Railroad, and also charging that the Trainmen and the Railroad had agreed upon a plan of action designed to discredit the Conductors and strengthen the Trainmen and thereby to influence, coerce and interfere with the class and craft of road conductors in their

^{*} The Board in the language quoted was obviously referring to Section 2, Third, and Section 2, Tenth, of the Railway Labor Act. The passage from the Act which it had quoted immediately preceding this comment, and which it described in the comment as being the "provisions of Section 3 as quoted above," is a passage from Section 2, Third, of the Act:

choice of a collective bargaining representative (R. 2-17). The specific acts alleged in the complaint as constituting coercion, influence and interference on the part of the Railroad consisted only of (1) the making and publication by the Trainmen and the Railroad of the agreement referred to above, which was alleged by the Conductors to have infringed their jurisdictional rights and violated the existing agreement between the Conductors and the Railroad (R. 14-15); (2) the completion and publication by the Trainmen and the Railroad of a separate agreement effecting a settlement of existing claims made by the Trainmen against the Railroad and on file with the National Railroad Adjustment Board (R. 15); (3) the alleged refusal of the Railroad to bargain and agree with the Conductors with respect to the matters in dispute between the Trainmen and the Conductors, and specifically its alleged failure to meet with the Conductors until about three weeks after the Conductors' withdrawal from the joint negotiations (R. 15-16); (4) the alleged making of certain statements by representatives of the Railroad to representatives of the Conductors in their bargaining conferences (R. 16). It will be observed that these allegedly coercive acts took place in the course of dealings among the two unions and the Railroad and that the only impact, if any, which is claimed to have been transmitted to the employees themselves consisted of the publication of the two agreements between the Trainmen and the Railroad.

In the complaint as thus originally filed, the Conductors, although aware of the fact that the Mediation Board was about to hold an election, did not name the Mediation Board as a party or seek in any way to prevent it from holding the election.

The Election.

On December 2, 1942, the Board ordered an election to determine the bargaining representative for the class or craft of road conductors, and ballots were taken from

December 5 to December 19. On December 27, 1942, the Board issued a certification that as a result of such election the Trainmen had been duly designated and authorized to represent the class or craft of road conductors on the Pennsylvania Railroad (R. 19, 75-76). Representatives appointed by the two rival unions for the purpose of observing the election, certified that the election was "conducted in a fair and impartial manner, and that the secrecy of the ballots was kept inviolate" (R. 87).

The Amended Complaint.

Thereafter, the Conductors amended their complaint in the instant case so as to include the Mediation Board as a party defendant. As thus amended, the complaint asked, (1) that the certification issued by the Board be annulled, (2) that the Board be enjoined from holding an election until it had investigated and held a hearing on the Conductors' charges of interference and coercion, (3) that certain portions of the agreement between the Trainmen and the Railroad be declared invalid under the Railway Labor Act, as infringing the jurisdictional rights of the Conductors, (4) that the Conductors be declared the proper bargaining agent to represent the class and craft of road conductors, and the Railroad be required to negotiate with the Conductors and be enjoined from negotiating or making an agreement with the Trainmen with regard to the work of said class or craft, (5) that the Railroad be enjoined from coercing, influencing or interfering with the class or craft of road conductors in their choice of a representative (R. 20-22).

Disposition in the Courts Below.

Upon a motion for summary judgment filed by the Conductors, asking to have the election and the Board's certification annulled and to have the Board enjoined from holding an election until it had investigated and considered

the Conductors' charges (R. 65-66), the District Court dismissed the complaint, on the ground that the facts alleged therein "do not establish that the plaintiffs have any cause of action" (R. 89).

While the appeal of the Conductors to the Court of Appeals for the District of Columbia was pending, this Court handed down its decisions in *Switchmen's Union v. National Mediation Board*, 320 U. S. 297 (1943), *General Committee v. M.-K.-T. R. Co.*, 320 U. S. 323 (1943), and *General Committee v. Sou. Pac. Co.*, 320 U. S. 338 (1943). On the basis of those decisions, the Mediation Board, the Trainmen, and the Railroad each filed in the Court of Appeals a motion to dismiss the Conductors' appeal, for lack of jurisdiction of the Court to consider the issues presented by the complaint (R. 92-108). These motions were granted by the Court of Appeals on the grounds, first, that the certification of the Board was final and unreviewable on the authority of the *Switchmen's Union* decision, second, that the federal courts do not have jurisdiction of the issues involved in the light of the *M.-K.-T.* and *Southern Pacific* decisions, and third, that even if it be conceded that the District Court had jurisdiction to grant the relief asked, the cause of action against the Railroad seeking an injunction against coercion and influence had become moot because the controversy out of which that cause of action arose, and the right of the Conductors to represent any class of employees in connection with that controversy, had been terminated by the Board's certification of the Trainmen as the authorized bargaining representative of the class of employees in question, and also because there was no allegation that any acts of coercion or influence on the part of the Railroad were continuing (R. 113-116). Petitioners filed their petition for certiorari in this Court, naming the Trainmen and the Railroad as respondents but omitting the Mediation Board as a respondent. The Mediation Board is therefore not before this Court (R. 125).

The Mediation Board's Position.

It is plain from the position taken by the Mediation Board throughout this case that it did not regard the acts complained of as having in fact interfered with or prevented the free and uncoerced exercise by the employes of their right to choose a bargaining representative.

Thus in its original answer to the complaint, the Mediation Board specifically averred that, following the Trainmen's invocation of its services, it had investigated the dispute and held an election and had taken a secret ballot of the employes and utilized "appropriate methods of ascertaining the names of the duly designated and authorized representatives of said employes *in such manner as insured the choice of representatives by the said employes without interference, influence, or coercion exercised by the carrier*" (R. 61) (Emphasis supplied). Subsequently, the Board filed an amended answer in which, referring to the Conductors' charges, it expressly denied "that the practices complained of constitute in fact unlawful coercion" (R. 74).

Its position in this respect was made entirely clear in its brief in the Court of Appeals below, a copy of which is lodged with the Clerk of this Court; and the relevant portions of which are reprinted in the Appendix to this brief. In that brief (p. 9) the Board, in contending that the motion for summary judgment was properly denied, said (see Appendix, pp. 5a-6a):

"The only requirement as to designation of representative contained in the Act is that in Section 2, third, which states that representatives shall be designated without carrier coercion. *The charges of carrier coercion made to the Board here did not, even if true, reasonably relate to the designation of representatives*, and therefore the Board was not required to investigate their truth. * * *

The court also properly dismissed the complaint because *the facts stated therein, which were treated*

by the court as true, did not allege unlawful coercion within the meaning of Section 2, third. These facts were the same as those alleged in the complaint to the Board and therefore likewise did not relate to coercion in connection with the designation of representatives, the only kind of coercion forbidden by that section. The allegations, furthermore, do not charge coercion within the meaning placed upon that term in this connection by the Supreme Court, since the conduct described was obviously not such as to override the will of an employee desiring to vote for O.R.C. and cause him to vote for B.B.T. (Emphasis supplied.)

Petitioners have not seen fit to name the Board as a respondent in this Court—perhaps because they did not want the Court to hear what the Board had to say—and therefore there is no opportunity for the Board itself to inform this Court as to its position. If there were such opportunity, there can be no doubt, in view of the above, as to what it would say regarding its position.

QUESTIONS PRESENTED

1. Under this Court's decision in the *Switchmen's Union* case, holding that Congress intended determinations by the National Mediation Board under the Railway Labor Act to be final and unreviewable, do the courts have power to nullify a Board certification in a case where, as in the *Switchmen's Union* case, the alleged error on the part of the Board consisted of an asserted misconstruction of its duties under the Act?

2. Independently of the *Switchmen's Union* decision, may a private suit like the present one, for judicial enforcement of the statutory right of employes to freedom

from coercion in their choice of a representative, be maintained in the face of the Congressional intent manifested in the statute that judicial enforcement of that right should be limited to the method specifically prescribed therefor in the statute, viz., by suits brought by United States attorneys under the direction of the Department of Justice?

3. Under the decisions of this Court in the *M.-K.-T.* and *Southern Pacific* cases, to the effect that jurisdictional disputes between labor organizations do not present justiciable issues under the Railway Labor Act, do the courts have the power to resolve an inter-union jurisdictional dispute, such as that here involved, merely because the disgruntled union in its complaint attaches the label of carrier coercion to some of the acts occurring in the course and as part of that dispute?

4. Independently of the *Switchmen's Union*, *M.-K.-T.* and *Southern Pacific* decisions, may the courts act, at the request of a railroad labor union, to set aside a Mediation Board certification and enforce alleged rights of employees whom, under the Board's certification, the union no longer represents, in a proceeding to which the Board is not a party?

SUMMARY OF ARGUMENT.

This is a case of a jurisdictional dispute between two rival railroad labor unions, which came to a head in the course of three-party bargaining negotiations among the unions and the Railroad. The position of the railroad in the dispute was and remains that of a "stakeholder," since it was as a practical matter obliged to come to an agreement with one or the other of the two unions, but was not able to agree with both, because of their conflicting demands.

The dispute resulted in (a) the withdrawal of one of the unions—the Conductors' organization—from the joint bargaining conferences, (b) an agreement between the other union—the Trainmen's organization—and the Railroad, and (c) an election held by the Mediation Board, pursuant to the request of the Trainmen, to determine the accredited representative of the class of employees previously represented by the Conductors. That election culminated in a certification by the Board that the Trainmen's organization constituted the accredited representative of that class of employees. As a result of such certification, the Conductors no longer represent any employees on the Railroad, and in this way by the action of the Board, the jurisdictional dispute has been resolved.

The Conductors' organization, naturally disappointed by its failure in the bargaining negotiations, presses this lawsuit against the Trainmen and the Railroad for the apparent purpose of recouping what it has lost through its bargaining failure and of ousting the Trainmen's organization from its position of accredited bargaining agent as certified by the Mediation Board. The suit has been dismissed in the courts below, and the petitioners here, although seeking an annulment of the Board's certification, have chosen not to name the Board, which was a party below, as a respondent in this Court.

This case is controlled by the decision of this Court in *Switchmen's Union v. National Mediation Board*, 320 U. S. 297 (1943). The Court there concluded that a certification such as that made by the Board in the present case, designating the accredited representative of a class or craft of employees, is final and not reviewable in the courts. That conclusion was based upon a consideration of the history of Congress' handling of the "explosive" problems in the field of railroad labor relations, upon the statutory mandate embodied in Section 2, Ninth, of the Railway Labor Act, requiring a carrier to "treat with" a representative

certified by the Board, and upon the complete absence in that Act of any provision for judicial review or annulment of a Board certification.

The factors which thus led this Court, in the *Switchmen's Union* case, to attribute complete finality to a Board certification are likewise present here, and apply with equal force to the certification issued by the Board in the instant case, designating the Trainmen as the accredited representative of road conductors on the railroad. The fact that the *Switchmen's Union* case involved the right of a majority of a craft or class of employes to choose their own representative, under Section 2, Fourth, of the Act, while petitioners in the present case have invoked the right of employes to be free from coercion in their choice of a representative, under Section 2, Third, does not differentiate this case from the *Switchmen's Union* case.

Petitioners assert that the *Switchmen's Union* decision does not apply because the Board allegedly failed to give consideration to the charge of coercion. The fact is that all the charges made in this suit, alleging carrier coercion in the employes' choice of their representative, were presented to the Board before it held the election. The Board, by its action in holding the election and issuing the certification notwithstanding the charges made by the Conductors, and by its various statements, has made it plain that it was not impressed with the charges and did not believe the acts charged would prevent the free exercise by the employes of their choice of a representative.

In any event, whether or not the Board passed on the Conductors' charges, there cannot be, under the Railway Labor Act as construed in the *Switchmen's Union* case, any judicial review of a Board certification, and, after the Board has acted, its determination must be re-

garded as final, so long as the *Switchmen's Union* decision stands.

However, even if the Switchmen's Union decision had not been made, the judgment of the Court of Appeals in this case would have to be affirmed. There are three reasons why that is so. The first reason lies in the provisions of Section 2, Tenth, of the Act. Those provisions prescribe a method for judicial enforcement of certain specified rights, including the right of employes to be free from coercion in their choice of a representative. The method thus prescribed consists of the bringing of a proceeding, of whatever type may be necessary to enforce the right in question, by a United States attorney under the direction of the Attorney General. Those provisions, read in the light of their legislative history and of the practical considerations lying behind them, manifest a clear Congressional intent that the method of judicial enforcement there provided shall be exclusive of other methods of judicial enforcement, and that private persons should not be permitted to take enforcement into their own hands by means of suits like the present one.

The second reason why petitioners' suit would have to fail even if the *Switchmen's Union* decision had not been made lies in the separate and independent decisions made by this Court in the cases of *General Committee v. M.-K.-T. R. Co.*, 320 U. S. 323 (1943), and *General Committee v. Sou. Pac. Co.*, 320 U. S. 328 (1943). In its decisions in those two cases, this Court held that jurisdictional disputes between rival labor unions, such as that involved in the present case, do not present justiciable issues under the Railway Labor Act, and therefore the courts may not be called upon to resolve such disputes. It is clear, from a consideration of the acts complained of by petitioners in this case, that the acts in question, even though claimed by petitioners to have "influenced" or tended to persuade

the employes with respect to their choice of a bargaining representative, did in fact constitute integral phases of the dispute between the two rival unions over their respective bargaining jurisdictions, and the issues presented thereby are therefore non-justiciable, under the *M.-K.-T.* and *Southern Pacific* decisions.

The final reason why petitioners' suit would necessarily fail even if the *Switchmen's Union* decision had not been made—and this reason would also apply even if the decisions in the *M.-K.-T.* and *Southern Pacific* cases had not been made—proceeds from the fact that petitioners have chosen not to name the Mediation Board as a respondent in this Court. As a result of this failure on the part of petitioners to appeal from the Court of Appeals' dismissal of the suit with respect to the Board, that dismissal has become final and unreversible, since the statutory period for such an appeal has now expired.

It follows that there is no way of compelling the Board to change or withdraw its certification in this proceeding, and the certification therefore stands as final and immune to judicial action by this or any other court in the present case. With that certification standing, the Trainmen's organization has exclusive status as statutory representative of the class of employes in question. Any bargaining or agreement with respect to those employes must now, under the mandate of the Act, be with the Trainmen and not with the Conductors. Since petitioners no longer have any standing to represent the employes in question, or any employes on the Railroad, and since the Board's certification which has brought about that result is now unassailable, neither this Court nor any other court can grant petitioners the relief which they seek in this case. The entire controversy has thus become moot.

For all of the above reasons, the judgment of the Court of Appeals below should be affirmed.

ARGUMENT.

I. A Suit of the Character of the Present One, Which Seeks Through Private Judicial Action to Nullify a Certification Made by the Mediation Board Under the Railway Labor Act, Must be Held to Lie Outside the Jurisdiction of the Federal Courts, in View of the Decision of This Court in the Switchmen's Union Case and in View of the Manifest Congressional Intent to Exclude Methods of Review or Enforcement Not Specifically Provided in the Act.

A. UNDER THE SWITCHMEN'S UNION DECISION, A DETERMINATION BY THE NATIONAL MEDIATION BOARD, UNDER SECTION 2, NINTH, OF THE ACCREDITED BARGAINING REPRESENTATIVE OF A CLASS OR CRAFT OF EMPLOYEES, IS FINAL, AND THEREFORE AN ATTEMPT, SUCH AS THAT HERE MADE BY PETITIONERS, TO HAVE THE COURTS ANNUL SUCH A DETERMINATION, MUST FAIL.

1. The Decision in the Switchmen's Union Case Was to the Effect That a Board Certification is Final.

The motions to dismiss the appeal, which were granted in the Court of Appeals below, were based primarily on the decision of this Court in the case of *Switchmen's Union v. National Mediation Board*, 320 U. S. 297 (1943). In that case, the facts were that the Board held an election among all the yardmen on the New York Central System in order to determine their choice of a representative, and certified the Trainmen as the duly authorized bargaining agent of all yardmen. The Switchmen's organization had contended that the yardmen on certain designated parts of the System should have been permitted to vote separately for a representative. The Board had concluded that the Railway Labor Act vested it with "no discretion to split a single carrier or combine two or more carriers for the purpose of determining who shall be eligible to vote for a representative of a craft or class of employees under

Section 2, Ninth, of the Act" (320 U. S. at p. 309). Accordingly, the Board had permitted all yardmen on the System to vote, with the result stated above. In its suit for cancellation of the Board's certification, the Switchmen took the position that the action of the Board in voting all yardmen on the System as a craft or class unit had in effect denied to the employes whom the Switchmen represented the right provided for in Section 2, Fourth, of the Act, viz., that "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act."

Upon a review of the applicable provisions of the Railway Labor Act, and particularly of the history of legislation in the field of railroad labor relations, which the Court apparently regarded as having special significance, this Court concluded that the action of the Board in holding an election and issuing a certification was final and not subject to judicial review. That conclusion was based upon several considerations. In the first place, there was found, in the history of legislation dealing with labor relations in the railroad industry, an indication that in the present Act "Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate" (320 U. S. at p. 302).

In the second place, it was found that Congress had delegated to the Board the task of protecting the "right" of employes embodied in Section 2, Fourth, of the Act, and that, in view of the special legislative history of the Act and the detailed provisions which it contains with respect to the Mediation Board's functioning, the elaborate Congressional specification of one method, viz., action by the Board, for the protection of that right should be taken as indicating a Congressional intent to exclude other methods not thus specifically provided, such as the judicial review there sought. Thus, after discussing the statutory

provisions made for the Board's determination of the bargaining representative of a craft or class; this Court said (p. 303 of 320 U. S.):

"Where Congress took such great pains to protect the Mediation Board in its handling of an explosive problem, we cannot help but believe that if Congress had desired to implicate the federal judiciary and to place on the federal courts the burden of having the final say on any aspect of the problem, it would have made its desire plain." (Emphasis supplied.)

In the third place, this Court regarded the provisions of Section 2, Ninth, of the Act, requiring the carrier to comply with the Board's certification and treat with the representative so certified, as also indicating that Congress intended such a certification to be final and conclusive. After referring to this statutory mandate in Section 2, Ninth, and drawing an analogy to the decision of Mr. Justice Brandeis in *Butte, A. & P. Ry. Co. v. United States*, 290 U. S. 127 (1933), to the effect that certain determinations by the Interstate Commerce Commission were final and conclusive because "essential to the performance" of the Commission's statutory duty and because Congress had not provided for judicial review, Mr. Justice Douglas in the *Switchmen's Union* case went on to say (p. 305 of 320 U. S.):

"In the present case the authority of the Mediation Board in election disputes to interpret the meaning of 'craft' as used in the statute is no less clear and no less essential to the performance of its duty. The statutory command that the decision of the Board shall be obeyed is no less explicit. Under this Act Congress did not give the Board discretion to take or withhold action, to grant or deny relief. It gave it no enforcement functions. It was to find the fact and then cease. Congress prescribed the command. Like the command in the *Butte Ry. case*

it contained no exception. Here as in that case the intent seems plain—the dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law.” (Emphasis supplied.)

Mr. Justice Douglas went on to point out that the Railway Labor Act contained no general provision for judicial review, and made specific provision for judicial review in certain circumstances but made no such provision with respect to determinations by the Mediation Board under Section 2, Ninth.

On the basis of all these considerations, it was concluded that the Congressional intent was clear that determinations by the Mediation Board under Section 2, Ninth, must be regarded as final and not subject to judicial review.

2. The Present Case is Controlled by the Decision in the Switchmen's Union Case.

To demonstrate that the present case is controlled by this Court's decision in the *Switchmen's Union* case, it is only necessary briefly to review the facts of this case. As already indicated, the Mediation Board has conducted an election and has certified the Trainmen as the duly accredited bargaining representative of the class or craft of road conductors on the Pennsylvania Railroad, thereby displacing the Conductors as the representative of that class. The Conductors objected to the holding of this election, on the ground of an alleged conspiracy between the Railroad and the Trainmen to coerce and interfere with the employees in their choice of a representative. The course of conduct alleged by the Conductors as constituting coercion and interference was considered by the Mediation Board, which determined that that conduct,

even if it did amount to unlawful coercion and interference—which the Board apparently believed it did not—nevertheless had no bearing or effect on the election and did not prevent the free and uncoerced exercise by the employees of their choice of a representative (pp. 9-10 above, and pp. 5a-12a of the Appendix hereto). The Board indicated that it had no jurisdiction of and therefore was not concerned with alleged acts of coercion and interference which had no bearing on the employees' choice of a representative and did not prevent the free exercise of that choice (R. 38-39). Accordingly, the Board proceeded with the election, and made the certification despite the Conductors' protest. The petitioners in this case are now asking the Court to take action which will have the effect of nullifying the Board's determination.

Thus, the petitioners here allege a violation of the "right" of employees set forth in Section 2, Third, of the Act to designate their representatives without interference, influence, or coercion on the part of the carrier. That "right," like the right involved in the *Switchmen's Union* case, is protected by Section 2, Ninth, wherein it is provided that:

"In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier." (Emphasis supplied.)

Here, as in the *Switchmen's Union* case, the Board has proceeded to act under Section 2, Ninth, and, after taking such steps as it deemed necessary and appropriate to insure the free and uncoerced choice of a representative by the employees in question, has certified the repre-

representative so chosen. Here, as in the *Switchmen's Union* case, the statutory mandate of Section 2, Ninth, requiring the carrier to give effect to the Board's certification and to treat with the representative so certified, is clear and compelling.

If the decision of this Court in the *Switchmen's Union* case stands, and the law continues to be what it has there been declared to be—viz., that Congress intended a certification by the Board of a collective bargaining representative to be a final and unreviewable determination of a representation dispute, so that “the dispute was to reach its last terminal point when the administrative finding was made,” and “there was to be no dragging out of the controversy into other tribunals of law”—if that decision stands, then the certification by the Board in this case of the Trainmen as the duly accredited bargaining representative of the class or craft of road conductors on the Pennsylvania Railroad must be regarded as final and conclusive, and any attack in court on that certification, either directly or indirectly, or any attempt in a judicial proceeding to nullify the certification or to achieve a result which would have that effect, must be rejected. The present suit is such an attack. It is an attempt by the petitioners, by means of a judicial proceeding, to have the Board's certification nullified and set aside. This is plain beyond a doubt, from the petitioners' brief in this Court. For example, they say (page 30 of petitioners' brief):

“It appearing that the *annulment of the election and certification of BRT as the conductors' representative is the only relief that will effectively vindicate the conductors' right to a free choice, it is clear that the district court has the power to annul that election and certification.*” (Emphasis supplied.)

It follows that the present suit, being an attempt to set aside the Board's certification, must, under the *Switchmen's Union* decision, fail, and the judgment below must for that reason alone, be affirmed.

3. *The Principle of the Switchmen's Union Decision Applies with Even Greater Force in the Present Case Since the Mediation Board is not Present to Defend Against the Conductors' Attempt to Have Its Certification Set Aside.*

Thus, under the *Switchmen's Union* decision the Board's certification in this case must be regarded as final, and not subject to being judicially reviewed or nullified, either directly or in any indirect manner such as that attempted by petitioners in this case. Here, the rule of administrative finality of a Board certification applies with even greater force than it did in the *Switchmen's Union* case. The Board is no longer a party to the present proceeding. If the federal courts do not have the power to set aside a certification of the Board in a proceeding to which the Board is a party, it follows *a fortiori* that the certification cannot be nullified where the Board is no longer present to defend its action.

Petitioners, by their position at this stage of the case, show themselves to be in an inextricable dilemma, made inevitable by the *Switchmen's Union* case. By virtue of that decision, they are forced to admit that they cannot obtain relief against the Board. Therefore, they do not name the Board as a respondent to their petition. On the other hand, they cannot obtain the relief which they seek unless they succeed in having the Board's certification set aside, and their petition makes it plain that that is their objective (Petition, 10). But any proceeding the purpose of which is to set aside an administrative determination such as that of the Board in this case must certainly include the administrative body as a party so that that body may defend its determination. This would necessarily follow from the fact that the order of the administrative body would remain in effect despite a contrary decree from this Court. In *North Dakota v. Chicago & N. W. Ry. Co.*, 257 U. S. 485 (1922), this Court

refused to create that dilemma. Speaking through Mr. Justice Holmes, it said:

"Complete justice requires that the railroads should not be subjected to the risk of two irreconcilable commands—that of the Interstate Commerce Commission enforced by a decree on the one side and that of this court on the other. The decision in this case although an authority would not be res judicata, and the Commission would not be concluded from rearguing the whole matter. * * *

"For the reasons that we have indicated it is equitable that a decree should not be entered except in such form as to bind the Interstate Commerce Commission and the United States and therefore this bill must be dismissed" (pp. 490-1 of 257 U. S.).*

With the Board no longer a party, petitioners must fail in their admitted attempt to have the Board's certification set aside. And if the Board were made a party, their petition would appear even more obviously to be what it in fact is, namely, an attempt to obtain judicial review of the Board's determination, which is precluded by the decision of this Court in the *Switchmen's Union* case.

It is clear that the petitioners' ultimate contention in this case is that the federal courts can and should accomplish indirectly something which this Court has held they have not the power to accomplish directly. The fundamental inconsistency in the petitioners' position is that they recognize the full sweep of the *Switchmen's Union* case in insulating the Board's certification from judicial review under all circumstances, but at the same time they attempt to carve out of the principle announced in that case the large field of representation disputes in connection with which the employees who are dissatisfied

* See also, *Wells v. Roper*, 246 U. S. 333, 337 (1918); *Bordien v. Pacific Oil Co.*, 299 U. S. 65, 70-71 (1936); and *Neher v. Harwood*, 128 F. 2d 846 (C. C. A. 9th, 1942).

with the result may claim that their right to be free from coercion and influence has been violated by the carrier. If any such exception can be read into the decision of this Court in the *Switchmen's Union* case, it becomes apparent that few representation disputes will in reality be settled by a certification of the Board.

B. INDEPENDENTLY OF THE SWITCHMEN'S UNION DECISION, THE PRESENT SUIT MUST FAIL BECAUSE IT IS NOT BROUGHT UNDER THE PROVISIONS OF SECTION 2, TENTH, AND THOSE PROVISIONS MANIFEST A CONGRESSIONAL INTENT TO PROVIDE THEREBY AN EXCLUSIVE METHOD OF JUDICIAL ENFORCEMENT OF CERTAIN SPECIFIED RIGHTS, INCLUDING THE RIGHT, HERE INVOKED, OF EMPLOYEES TO BE FREE FROM COERCION IN THEIR CHOICE OF REPRESENTATIVES.

In addition to the considerations with respect to the legislative history and specific provisions of the Act which led this Court in the *Switchmen's Union* case to the conclusion that a Board certification is final and unreviewable and brings to an end all controversies involved in the particular representation dispute, there are other reasons strongly supporting the conclusion that it would be contrary to the intent of Congress to permit judicial relief to be had in a proceeding like the present one. In the first place, the provisions of Section 2, Tenth, of the Act, read in the light of their legislative history, clearly indicate that those provisions were intended by Congress to provide the sole and exclusive method of judicial enforcement of certain specified rights, including the right here in question, apart from the administrative remedy provided in Section 2, Ninth, and that if any judicial relief is to be had at all for infringement of those rights, it should be only through the provisions of Section 2, Tenth. In the second place, there are important practical considerations which support this view, and which Congress may well have had in mind in creating the scheme of statutory enforcement that it did.

1. The Provisions of Section 2, Tenth, and Their Legislative History Manifest a Congressional Intent to Provide, Thereby an Exclusive Method of Judicial Enforcement of Certain Specified Rights, Including the Right Here in Question.

The right, here invoked by petitioners, of employes to be free from coercion, influence and interference in their choice of representatives, embodied in Section 2, Third, of the Act, is protected not only by the remedy of Board action provided for in Section 2, Ninth, but also by the specific provisions of Section 2, Tenth. Section 2, Tenth, after providing a penalty of fine or imprisonment for the wilful failure of a carrier or its officers to comply with the terms of the Third and certain other specified paragraphs of Section 2 of the Act, goes on to provide as follows:

"It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof." (Emphasis supplied.)

It is important to note that the above quoted language from Section 2, Tenth, indicates that the judicial remedy provided in that paragraph is not limited to criminal proceedings to punish violations of the rights specified, but also clearly contemplates affirmative judicial action in other types of proceedings, legal or equitable, brought by United States attorneys to prevent violations of Section 2 and to rectify conditions resulting from such violations. That meaning is the only possible interpretation of the words "all necessary proceedings for the enforcement of

the provisions of this section," which words are distinguished and set apart from what follows, namely, "and [proceedings] for the punishment of all violations thereof."

The present proceeding is of course not a proceeding brought under Section 2, Tenth. On the contrary, it is an attempt by petitioners to take into their hands and set up their own method for the enforcement of Section 2, Third, without the direction or concurrence of any District Attorney of the United States or the Attorney General, and therefore in disregard of and inconsistently with the specific procedure which Congress has expressly provided for such enforcement. That it was the Congressional intent to limit such enforcement to proceedings under Section 2, Tenth, and therefore to exclude a suit like the present one, is clear from the legislative history of Section 2, Tenth.

At hearings before the Senate Committee on Interstate Commerce in 1934, in connection with proposed amendments to the Railway Labor Act of 1926, which proposed amendments included the enforcement provisions that later became Section 2, Tenth, of the Act, Mr. Joseph B. Eastman, then Federal Coordinator of Transportation, under whose direction the original proposals for amendments had been drafted, discussed the provisions of the Railway Labor Act of 1926 with respect to interference, influence and coercion exercised by carriers over their employes in their designation of representatives. In connection with the portion of the 1926 Act dealing with that subject, Mr. Eastman said:

"While this provision stated a noble purpose, it has not proved to be self-enforcing, and the act provided no other means of enforcement. Consequently the purposes were not accomplished." (Hearings, Committee on Interstate Commerce, United States Senate, on S. 3266, 73d Cong., 2d Sess., p. 11.)

Mr. Eastman made substantially the same statement to the House Committee on Interstate and Foreign Commerce at hearings held in connection with similar proposals for the amendment of the Railway Labor Act of 1926. (Hearings, Committee on Interstate and Foreign Commerce, House of Representatives, on H. R. 7650, 73d Cong., 2d Sess., p. 22.)

In explaining the purpose of the proposed amendments to the Act, insofar as they related to the prohibition against interference, influence and coercion, Mr. Eastman made the following significant statement to the Senate Committee, obviously in reference to the Section 2, Tenth, provisions (Hearings, p. 14):

"In redrafting the provisions for incorporation in the Railway Labor Act, all of these points have been kept in mind, and it has also been the endeavor to cover specifically the various means whereby railroad managements have exerted or sought to exert undue influence upon the choice or conduct of labor organizations.

"Enforcement involves nothing but the determination of the facts, and for this reason it has in S. 3266 been definitely placed, where it belongs, in the hands of the Department of Justice." (Emphasis supplied.)

Mr. Eastman made substantially the same statement in his appearance before the House Committee on Interstate and Foreign Commerce (Hearings, p. 28).

In summarizing to the House Committee (Hearings, p. 43) the effect of the proposed changes in Section 2 of the Railway Labor Act of 1926, Mr. Eastman said:

"I want to make it clear that the principle behind that section 2 is exactly the same principle which is now enunciated in the present section 2 of the present Railway Labor Act. However, so far as the present

act is concerned, there is no provision for the enforcement of that principle and it has not, in fact, been enforced.

"All that we are undertaking to do is to translate the principle which is now enunciated in the present Railway Labor Act into definite, specific provisions, free from ambiguities, and with adequate provisions for their enforcement. * * * It seeks only to give clarity, vitality, and positive sanctions to what is now, as far as the Railway Labor Act is concerned, no more than a pious wish." (Emphasis supplied.)

The report of the Senate Committee, favoring the adoption of the proposed amendments (S. Rep. No. 1065, 73d Cong., 2d Sess.) states at p. 2 of the report:

"Another extremely important change from the present law which this bill provides is that it prohibits any carrier from providing financial assistance to any union of employees from funds of the carrier. It also prohibits the railroads from interfering in any manner whatsoever with employees joining or refusing to join any organization or union. * * *

"This prohibition is not new. Congress has declared it three times: in the present Railway Labor Act, the Bankruptcy Act and the Emergency Transportation Act. But there are no penalties against its violation. This bill provides severe penalties for violation of the law." (Emphasis supplied.)

The foregoing references to testimony before the Senate and House Committees considering the proposed amendments to the Railway Labor Act in 1934, and to the report of the Senate Committee, indicate that Congress understood at the time when the present amendments were

approved that those amendments were designed to set up a complete statutory scheme for the enforcement of the rights of collective bargaining guaranteed to employes by the provisions of Section 2 of the Act, including the right to be free from coercion in their choice of representatives. As pointed out above, this legislative intention is embodied in the actual language of Section 2, Tenth, which places in the hands of the United States attorneys the duty of instituting "all necessary proceedings for the enforcement of the provisions of this section", under the direction of the Attorney General, thereby placing enforcement "where it belongs, in the hands of the Department of Justice." Thus, both by the language of the Act and by its legislative history, it is apparent that the Railway Labor Act as now written is designed to provide an exclusive statutory scheme for the enforcement of the right of employes to be free from interference, influence and coercion by a carrier in their choice of a representative. There is no provision in that statutory scheme for a suit of the present character.

In this connection it is significant to note that the same conclusion was reached by the Mediation Board in this very case. In its letter to the President of the Conductors, rejecting that organization's protest against the holding of an election, the Board made the following statement (R. 39):

"In this comment on carrier influence, it seems unnecessary to do more than point out to you that *the Railway Labor Act prescribes an exclusive procedure for the protection of employees in the choice of representatives. The provisions of Section 3* as quoted above may be made effective through the application of Section 10* of the Act.*"

This expression of opinion is obviously entitled to be given substantial weight, coming as it does from a body

* These references are obviously to Section 2, Third, and Section 2, Tenth, of the Act, as explained in the footnote on page 5 above.

charged with the administration of many of the features of the Railway Labor Act and experienced in the operation of the entire statutory scheme of that Act.

2. Practical Considerations Reinforce the Interpretation of Section 2, Tenth, as Intended to Provide an Exclusive Method of Judicial Enforcement of the Rights Specified.

Finally, certain practical considerations, which may well have been in the mind of Congress when it amended the Railway Labor Act in 1934, lead to the conclusion that the judicial remedy specified in Section 2, Tenth, for the enforcement of certain specified rights, including the right to freedom from interference, influence and coercion, is intended to be exclusive and to foreclose resort to the courts at the discretion of individual employes or labor organizations. Congress undoubtedly realized, as this Court pointed out in the *Switchmen's Union* case, that the choice of bargaining representatives by employes is "an explosive problem" which is highly charged with the emotional feelings of the participants. Following the disposition of such controversies it is only natural that those who are disappointed with the results frequently feel inclined to carry their grievances into the courts and to prolong the final disposition of the dispute by protracted litigation.

In such circumstances, it could be foreseen that the policy of the Railway Labor Act to provide for "prompt and orderly settlement" of disputes (Section 2, preliminary paragraph) would be defeated by the tendency of disappointed employes and labor organizations to attempt to salvage their lost causes by the aid of resort to judicial processes. To prevent that result from hampering the satisfactory operation of the Railway Labor Act, it was necessary to provide what might be called a "screening process," whereby charges of violation of Sec-

tion 2 of the Act which were without basis in fact could be prevented from crowding the dockets of the courts. The most ready means of accomplishing this selective supervision over such charges was a provision for initial handling by the United States attorneys, thereby, to quote Mr. Eastman, placing the enforcement "where it belongs, in the hands of the Department of Justice." These officers could consider not only the charges of violation of the Act but also the evidence available to substantiate those charges and, in that process, could prevent prospective litigants who had no adequate legal basis for complaint from dragging out their electioneering efforts before courts and juries after the Mediation Board had counted them out on the basis of the votes cast by the employees.

If the exclusive procedure specified by Congress had been followed in the present case, it is probable that this dispute would never have reached a district court, and certainly not this Court. By following the course which they have, the petitioners have succeeded in keeping the Pennsylvania Railroad and the certified representative of its road conductors in constant doubt for a period of more than two years as to their respective rights and duties, and, of more particular importance, in doubt with respect to the validity and permanence of the numerous negotiations, agreements, settlements and understandings which they have made with regard to employees in the class and craft of road conductors. It appears obvious that Congress did not contemplate paying so huge and unnecessary a penalty in the form of disrupted and uncertain labor relations merely for the purpose of making available additional and unnecessary means for the enforcement of Section 2, Third.

Thus, it is plain from the above considerations that, in view of this Court's decision in the *Switchmen's Union* case, and in view of the statutory scheme, consisting of the provisions of Section 2, Ninth, and Section 2, Tenth, of the Act, set up by Congress for the enforcement of the

right which petitioners here claim has been violated—which statutory scheme from its own provisions and legislative history was manifestly intended by Congress to be exclusive—and finally in view of the practical considerations which strongly support the view that such statutory scheme was designed to be exclusive, it must be concluded that to permit the maintenance of a suit of the present character, which finds no place in the statutory scheme, would be to extend the statute beyond the scope intended by Congress.

C. PETITIONERS' ARGUMENT IN THIS COURT, IN SEEKING TO ESCAPE THE EFFECT OF THE SWITCHMEN'S UNION DECISION, IS FATALLY DEFECTIVE IN THAT IT (a) MISCONSTRUES THE DECISION OF THIS COURT IN THE SWITCHMEN'S UNION CASE; (b) FALSELY ASSUMES THAT THE BOARD FAILED TO GIVE CONSIDERATION TO THE CHARGES OF COERCION IN THIS CASE; AND (c) DISREGARDS THE EXCLUSIVE CHARACTER OF THE STATUTORY SCHEME FOR JUDICIAL ENFORCEMENT EMBODIED IN SECTION 2, TENTH, OF THE ACT.

In an endeavor to escape the consequences of this Court's decision in the *Switchmen's Union* case, the petitioners, in their position before this Court, are attempting to make it appear that they are not asking for a review of the Board's certification. Although the Board has been a party to this proceeding almost from its inception, the petitioners do not name the Board as a respondent to their petition in this Court. Actually, however, the petitioners are asking this Court to hold that the certification of the Board may be set aside in order to provide the allegedly necessary protection for the right of road conductors on the Pennsylvania Railroad to be free from interference and coercion in their choice of a representative. By not naming the Board as a respondent to their petition and by asserting that they are not asking this Court to reconsider its decision in the *Switchmen's Union* case, the peti-

tioners hope to make it appear that their case does not fall within the decision of this Court in that case.

Petitioners' position in this connection is substantially as follows: The *Switchmen's Union* decision held only that the right of a "majority of any craft or class of employees" to "determine who shall be the representative of the craft or class," which right is set forth in Section 2, Fourth, of the Act, may not be enforced by judicial proceedings since Congress intended that the enforcement of that right by the administrative action of the Board under Section 2, Ninth, should be exclusive. Petitioners then contend that the right involved in this case, guaranteed by Section 2, Third, of the Act, is somehow different, and that it cannot be enforced by the Board under Section 2, Ninth, because the Board in this case allegedly held that it could prevent violations of that right only when such violations occurred during the course of a representation election. Petitioners, purportedly on the basis of the *Switchmen's Union* decision, conclude that this alleged interpretation by the Board of its statutory powers and duties is conclusive, and they argue that, since the Board is thus legally unable to enforce the right guaranteed by Section 2, Third, in the present case, the road conductors on the Pennsylvania Railroad would be left without any remedy whatsoever against the asserted coercion and interference unless this Court decides to assume jurisdiction of the present proceeding. In this connection, petitioners rely upon the decisions of this Court in *Texas & N. O. R. Co. v. Ry. Clerks*, 281 U. S. 548 (1930), and *Virginian Ry. v. The Federation*, 300 U. S. 515 (1937), and upon the statement made by this Court in the *Switchmen's Union* case, (320 U. S. at p. 300), in explanation of these prior decisions, to the effect that:

"If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong

that Congress intended the statutory provisions governing the general jurisdiction of those courts to control."

This line of argument leads the petitioners to the conclusion that, under the *Texas & N. O.* case, the *Virginian Ry.* case and the *Switchmen's Union* case, this Court must assume jurisdiction of the present proceeding in order fully to enforce the rights guaranteed by Section 2, Third, of the Act, and that such assumption of jurisdiction would be entirely in accordance with, and in no way inconsistent with, the decision of this Court in the *Switchmen's Union* case.

In this argument of petitioners there are three fatal faults. The first is the petitioners' assumption that the *Switchmen's Union* case simply held that the rights guaranteed by Section 2, Fourth, of the Act may only be enforced by the exclusive administrative procedure provided by Congress in Section 2, Ninth, of the Act. The second fallacy into which the petitioners have fallen consists of the assertion that the Board in this case, in failing to give effect to the petitioners' charges of coercion and interference and to postpone the election as requested by them, refused to consider or pass upon those charges and that it did so for the sole reason that it believed it had no authority under the law to investigate them because they related to events occurring prior to the actual election of representatives among the road conductors. The final defect in petitioners' argument in this connection lies in the fact that they ignore entirely the provisions of Section 2, Tenth, of the Act, which provide a complete and adequate judicial remedy for the enforcement of the right of employees to be free from coercion and interference in their choice of a representative, even assuming that the Board in this case did not consider the merits of the petitioners' charges of coercion and interference, and assuming that the *Switchmen's Union* decision had not been made.

1. *The Holding of This Court in the Switchmen's Union Case Was to the Effect That a Certification by the Board is Final and Disposes Conclusively of All the Issues Arising in the Course of a Representation Dispute, and Not Merely Issues Arising From an Asserted Violation of Section 2, Fourth, of the Act.*

In their argument before this Court, the petitioners contend (petitioners' brief, pp. 23-25) that the decision in the *Switchmen's Union* case was merely to the effect that the federal courts do not have jurisdiction to enforce the "majority" right of representation guaranteed by Section 2, Fourth, of the Act, and that the Mediation Board, acting under Section 2, Ninth, had the exclusive power to enforce that right. But the decision in the *Switchmen's Union* case was not so limited.

The actual holding by this Court in the *Switchmen's Union* case is stated as follows, at the outset of the majority opinion after the statement of the facts in the case (320 U. S. at p. 300):

"We do not reach the merits of the controversy. For we are of the opinion that *the District Court did not have the power to review the action of the National Mediation Board in issuing the certificate.*" (Emphasis supplied.)

Thus, the actual decision of this Court in the *Switchmen's Union* case was, not that Section 2, Fourth, is enforceable only by administrative action of the Board under Section 2, Ninth, but that a certification issued by the Board represents a final, conclusive and unreviewable determination of the representation dispute for which it is issued, and that any such representation dispute between rival labor organizations which culminates in such a certification is thereby finally disposed of and cannot thereafter be the subject of consideration in a judicial proceeding. The exact nature of the holding by this Court in the

Switchmen's Union case is again emphasized in the statement that "Congress gave administrative action under §2, Ninth a finality which it denied administrative action under the other sections of the Act", which statement appears near the end of the opinion of the majority in that case (320 U. S. at p. 306f.).

As pointed out above (pp. 17-19), the actual decision thus made by this Court was founded upon four distinct considerations. The petitioners' first error lies in the fact that they regard one of those four considerations as constituting the whole decision of the Court. The four factors which led this Court to its ultimate conclusion that a certification by the Board is final and unreviewable were the following: (a) the history of Congressional legislation in the field of railroad labor relations indicates that, in the present Act, "Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate"; (b) the enforcement of the right guaranteed by Section 2, Fourth, is placed in the hands of the Mediation Board by Section 2, Ninth, and Congressional "specification of one remedy normally excludes another"; (c) the "statutory mandate" of Section 2, Ninth, requiring a carrier to "treat" with the representatives certified by the Board, is explicit and unconditional, thus indicating a Congressional intention that the representation dispute "was to reach its last terminal point when the administrative finding was made"; and (d) the fact that Congress provided for judicial review of certain administrative actions under the Act but did not expressly provide for such review of a certification by the Board is an indication of a Congressional intention to make such a certification final and unreviewable.

When the decision of this Court in the *Switchmen's Union* case is thus correctly analyzed, it will be seen that the fact that Congress placed the enforcement of the right guaranteed by Section 2, Fourth, in the hands of

the Mediation Board by establishing that enforcement function as one of the Board's duties under Section 2, Ninth, was merely one of the four distinct factors which led this Court in that case to its ultimate decision that Congress intended a certification issued by the Board under Section 2, Ninth, to be final and unreviewable. The chief fallacy in petitioners' attempt to distinguish the present proceeding from the *Switchmen's Union* case, is that petitioners' argument is founded entirely on an attempted differentiation between Section 2, Third, and Section 2, Fourth, and on the fact that Section 2, Fourth, was involved in the *Switchmen's Union* case while this case involves Section 2, Third. For the reasons already stated, it is clear that Section 2, Third, is indistinguishable from Section 2, Fourth, so far as the holding in the *Switchmen's Union* case is concerned, and that the Congressional intent of complete finality of a Board certification, found in that case to attach to a certification determining a dispute involving Section 2, Fourth, is equally applicable to a Board certification determining a dispute involving Section 2, Third.

However, even if the status of Section 2, Third, in the statutory scheme of the Act were in some way distinguishable from the status of Section 2, Fourth, that fact would be insufficient to prevent the application of the decision in the *Switchmen's Union* case to the present proceeding. The history of railway labor legislation, the provision of Section 2, Ninth, requiring a carrier to treat with the representative certified by the Board, and the absence of an express statutory provision for judicial review of a Board certification—factors upon which this Court relied in the *Switchmen's Union* case—are still present in this case as an indication of the intent of Congress with regard to the finality of a certification. In short, a certification issued by the Board under Section 2, Ninth, is either reviewable or not reviewable. Since this Court specifically decided in the *Switchmen's Union* case that a

certification is not reviewable, and since that decision was founded upon several indications of Congressional intent which are equally valid here, the petitioners' contention to the contrary in this case must fail unless the *Switchmen's Union* decision is overruled and the Congressional purpose is found to be contrary to what it was declared to be in that case.

2. The Board Did in Fact, Contrary to Petitioners' Assertion, Give Consideration to Their Charges of Coercion Before Holding the Election, and Thus Fulfilled its Duty Under Section 2, Ninth, in This Case.

On the basis of their erroneous interpretation of the *Switchmen's Union* case, discussed immediately above, the petitioners go on to contend that the rule of administrative finality of a Board certification is not applicable to the present proceeding because of the Board's asserted failure in this case to fulfill its duty under Section 2, Ninth, in that it allegedly refused to give consideration to the charges of coercion and interference which the petitioners presented to it prior to the election, and which are the same charges as those now contained in the present complaint. That contention is based upon a mistaken understanding of the Board's position with respect to the petitioners' charges. Petitioners placed their charges of coercion before the Board more than a month prior to the holding of the election (R. 23, 86). What the Board thought of those charges can best be determined by a consideration, not only of what the Board said, but of what the Board did after it had those charges before it.

(a) The Action of the Board.

That the Board gave extended consideration to the petitioners' charges first appears from the fact that the Board wrote a long and carefully reasoned letter to the

petitioners about them (R. 33-40). Thereupon, having these charges before it and after giving extensive consideration to them, the Board proceeded to hold an election among the road conductors, and, as a result of that election, certified the Trainmen as the duly accredited bargaining representative of that class or craft of employees on the Pennsylvania Railroad. The Board thus refused to grant the petitioners' request to postpone the election on the basis of the charges made against the Trainmen and the Railroad.

Plainly, if the Board had thought that the acts alleged to have been committed by the Trainmen and the Railroad would prevent the free and uncoerced exercise by the employees of their choice of a representative, it would have refrained from holding the election, as the petitioners requested. Regardless of what the Board may have said, or what reasons it may have given for not acceding to the petitioners' request, the mere fact that the Board proceeded with the election and issued a certification is a conclusive indication that it did not consider the petitioners' charges of coercion as substantial or meritorious. It certainly may not be assumed that an administrative agency charged by law with the duty of determining representation disputes among groups of employees in such a way as to secure the free and uncoerced choice of those employees, would proceed with an election among the employees and issue a final certification of their authorized representative when that administrative agency had any reason to believe, or even to suspect, that the employees were not entirely free and uncoerced in making their choice.

Any such assumption would be particularly inappropriate in this case, since the petitioners have not seen fit to name the Board as a respondent in this Court, and there is, therefore, no opportunity for the Board to explain directly to the Court its actual opinion of the petitioners' charges of coercion. In the absence of any such opportunity for the Board to give its own explana-

tion of its action in proceeding with an election after charges of coercion had been filed with it; that action must be taken as conclusively demonstrating the Board's opinion that the charges were unsubstantial and, even if true, did not indicate the existence of any coercion or interference in violation of the provisions of the Act.

But even if the Board's action should not be taken as a conclusive indication of its view and it should be regarded as necessary to look at the Board's statements, there is in those statements ample evidence of the Board's views with respect to the petitioners' charges.

(b) *The Statements of the Board.*

Petitioners point to some language in the Board's letter to the President of the Conductors, in which the Board rejected their protest against the holding of the election (R. 33-40), and argue that, since the Board there stated that it had no jurisdiction over the circumstances alleged by petitioners as having constituted coercion and interference, the petitioners' charges must be treated as having been ignored by the Board. But the fact that the Board stated it lacked jurisdiction of the matters complained of did not in any way impair the finality which, under the *Switchmen's Union* decision, must be attributed to the Board's action in certifying the Trainmen as the proper representative of road conductors. In the *Switchmen's Union* case, the Board, in refusing to give effect to the protest made against its holding an election, did so there, as here, on the ground that under the Act it had "no discretion" to do what the protestants asked it to do, namely, to treat different parts of a railroad system as separate units for the purpose of determining representatives (320 U. S. at p. 309). Despite that fact, this Court held the Board's determination as to the proper representative to be final, and decided that the courts were precluded from passing upon the protestants' objection with respect to which the Board had said it had no discretion. The same conclusion should be reached here.

Petitioners in their argument assume that the Board refused to give effect to their charges of coercion solely for the reason that the alleged acts of coercion took place prior to the election and that the Board therefore had no jurisdiction to consider them. This assumption attributes less perspicacity to the Board than is warranted, and is, in fact, contrary to the Board's own statements. The fact is that it is plain from the Board's various statements on the subject, including not only its letter to the petitioners but its original and amended answers filed in this case and its brief in the court below, that the Board did not refrain from giving effect to petitioners' charges simply because the time of occurrence of the acts charged was prior to the election. On the contrary, in referring to the fact that the alleged acts of coercion occurred prior to the election, the Board was attempting to express its view, which it subsequently made clear, viz., that it was not concerned with the alleged acts of coercion because they were not related to and had no bearing or effect on the election, and that despite those acts, even if the charges regarding them be accepted as true, the employees exercised their choice of a representative in a free and uncoerced manner (see discussion at pp. 9-10 above, and pp. 5a-12a of Appendix hereto).

Thus, contrary to the petitioners' assumption, the actual facts are that the Board did consider petitioners' charges, and did determine that the employees' exercise of their choice of a representative was free and uncoerced.

With respect to acts of coercion and influence which have no effect on and do not prevent the free exercise of the employees' choice of a bargaining representative, the Board correctly took the position that it had no jurisdiction. There is no question before the Court in this case as to whether such acts may constitute a violation of the Railway Labor Act and, if so, what remedy, if any, is appropriate for one prejudiced thereby, because petitioners' only complaint herein with respect to alleged coercion is that it interfered with the right of the em-

ployes to a free choice of representatives. If such question were before the Court, the answer would be, first, that it is only coercion and interference which prevents the free exercise of the employes' choice of a representative, or the free organization and management of a labor union, that is forbidden by the Act, and second, the remedy in any event would not be in a proceeding like the present one but would be in a proceeding brought under Section 2, Tenth.

3. *A Complete and Adequate Remedy is Available to Employes, Under Section 2, Tenth, For the Enforcement of Their Right to Freedom From Coercion, Whether or Not the Provisions of Section 2, Ninth, Provide Such a Remedy and Whether or Not the Board in This Case Performed Its Full Duty Under Section 2, Ninth.*

It has been shown above (pp. 35-42) that the petitioners, in order to avoid the application of the *Switchmen's Union* decision, have erroneously assumed that that case was decided only in the light of Section 2, Fourth, of the Act, and that Section 2, Ninth, of the Act does not provide petitioners with a remedy for the enforcement of the rights guaranteed by Section 2, Third, because the Board in this case did not fulfill its duty under Section 2, Ninth, in that it allegedly failed to give consideration to the petitioners' charges of coercion and interference by the Railroad. The petitioners' argument in this connection is based on those erroneous assumptions and upon the further contention that, unless petitioners are permitted to obtain relief in a suit of this character, the right of employes to be free from coercion, interference and influence in their choice of a representative—which right petitioners claim has in some way been violated in this case—will be left unprotected in any case where, as petitioners here claim, the Mediation Board for any reason refuses to consider or pass upon the employes' charges of coercion. That contention completely ignores the provisions of Section 2, Tenth.

Section 2, Tenth, provides for the protection of rights embodied in Section 2, including the right of freedom from coercion, through the bringing of any proceeding, criminal or otherwise, which may be necessary for the protection of those rights. Such a proceeding, however, cannot be brought by a private party but must be brought by a district attorney of the United States and must be prosecuted under the direction of the Attorney General. It has been shown above (pp. 25-30) that this method for the protection of rights guaranteed by Section 2, together with the remedy provided in Section 2, Ninth, constitutes an exclusive statutory scheme for the enforcement of the rights in question, including the right to freedom from coercion and interference in the choice of representatives, and that proceedings like the present one which lie outside the statutory scheme are therefore barred. Within the framework of that statutory scheme, the employees are not limited to relief through Board action, as provided in Section 2, Ninth, but may obtain judicial relief through the aid of the Department of Justice, if necessary. It is clear, therefore, that denial of the petitioners' present suit will not mean the exclusion of employees from judicial relief, entirely apart from Board relief, for the protection of their right to freedom from coercion, and therefore will not mean the obliteration of that right.

It follows from what has been said above that, contrary to the petitioners' contention, the decisions of this Court in *Texas & N. O. R. Co. v. Ry. Clerks*, and *Virginian Ry. v. The Federation*, *supra*, have no application to this case. Those cases are explained by Mr. Justice Douglas in the *Switchmen's Union* decision as supporting the proposition that judicial relief through the general jurisdiction of the courts will be granted where the failure to do so would result in the obliteration of a right created by Congress. But the denial of relief to petitioners in this suit will not mean the

obliteration of any such right, for the reasons already stated.

In the *Clerks* case, it was found necessary to grant such relief because the statute then before the Court—viz: the Railway Labor Act of 1926, made no provision for means of enforcement of the right, created by that statute, of railroad employees to be free from carrier coercion and interference in their choice of representatives. Under the Act, as amended in 1934, employees have been provided with two specific remedies for the protection of that right—administrative action under Section 2, Ninth, and judicial action under Section 2, Tenth. Petitioners here have had the benefit of the administrative remedy, but nevertheless are attempting in this case to obtain judicial relief in a proceeding that is inconsistent with the judicial remedy specified in the statute.

The *Virginian Ry.* case differed essentially from the present case in that the acts of coercion and interference alleged in that case occurred after the Mediation Board had certified the union as the representative of the employees and related only to the alleged attempts by the carrier to prevent the union from acting as such representative. Thus, the charges of coercion and interference in that case had no bearing whatsoever on the validity of an election held by the Board, and were not passed upon by the Board as a part of its administrative action under Section 2, Ninth. Judicial protection of the right to freedom from coercion, in the *Virginian Ry.* case, was therefore granted in aid of, and not in derogation of, the administrative determination. In the present case, on the other hand, the alleged acts of coercion were considered by the Board and the Board refused to postpone its investigation of the representation dispute because it believed that the charges of coercion, even if true, could have no effect on the election and therefore did not establish such coercion or interference as is prohibited by the Act (see pp. 9-10 above). Judicial action is now sought to set aside the administrative action.

Furthermore, it should be noted that in the *Virginian Ry.* case, this Court did not have before it the question whether the right to freedom from coercion and interference can be enforced in a proceeding brought under the general jurisdiction of the federal courts, as is evident from the following language in the opinion (300 U. S. at pp. 543-4):

"Petitioner does not challenge that part of the decree which enjoins any interference by it with the free choice of representatives by its employees, and the fostering, in the circumstances of this case, of the company union."

It is true that this statement was followed in the Court's opinion by a statement to the effect that that question could not be raised because it had been settled by the *Clerks* case. But it is obvious that the Court did not then have in mind the considerations which it has spelled out in the *Switchmen's Union* case, nor did it have in mind the fact that Section 2, Tenth, added to the Act after the decision in the *Clerks* case, had provided a specific method for judicial protection of the right to freedom from coercion and therefore had eliminated the necessity which the Court in the *Clerks* case had found, under the 1926 Act, of resorting to the general jurisdiction of the courts for the protection of that right.

II. Under the Decisions of This Court in the M. K. T. R. Co. Case and the Southern Pacific Case, the Issues Presented by the Petitioners' Complaint, Are Not Justiciable Because They Require a Determination of the Conflicting Jurisdictional Claims of Rival Labor Organizations, and the Fact that Conduct Alleged to Have Violated Jurisdictional Rights is Also Labelled as Carrier Coercion Does Not Alter the Result.

As pointed out above (at pp. 2-4), the present case arose out of, and the complaint is ultimately based

upon a jurisdictional dispute between the Conductors and the Trainmen as to which of the two organizations had the right to negotiate and bargain with the Railroad concerning the rates of pay and working conditions of "assistant conductors or ticket collectors" and the movement of employes into and out of the brakeman class. An identical type of dispute was before this Court in *General Committee v. M.-K.-T. R. Co.*, and *General Committee v. Sou. Pac. Co.*, *supra*.

In both the *M.-K.-T.* case and the *Southern Pacific* case, as in the instant case, the petitioner was a labor organization and the respondents were a carrier and a rival labor organization. In each of those cases the petitioner complained that the carrier had entered into agreements with the respondent labor organization, and the petitioner contended that those agreements were illegal and void under the Railway Labor Act because they constituted an encroachment upon the bargaining authority or jurisdictional rights of the petitioner. Upon a review of the history and applicable provisions of the Act, this Court concluded that the federal courts are without power to resolve such jurisdictional controversies because the question as to the respective bargaining jurisdictions of rival labor organizations does not present justiciable issues. It was held that, since no specific provision in the Railway Labor Act authorized judicial determination of jurisdictional disputes, "Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate," and that the judicial power of the federal courts did not extend to controversies of that type (*M.-K.-T.* case, 320 U. S. 323, at p. 333).

In the present case, as in the *M.-K.-T.* case and the *Southern Pacific* case, the entire controversy originated out of the conflicting demands of two rival labor organizations. The Conductors and the Trainmen were conducting joint negotiations with the Railroad. In the course of those negotiations, the Conductors and the Trainmen found

themselves in conflict with regard to their respective jurisdictional rights to represent and negotiate in behalf of certain groups of employees. After the Conductors withdrew from the joint negotiations, as a direct result of their dispute with the Trainmen, the Railroad was faced with the necessity of concluding an agreement with one or the other of the two unions, an agreement with both being apparently impossible because of their conflicting claims. It ultimately reached an agreement with the Trainmen, and that agreement, among other things, fixed the rates of pay and working conditions of a group of employees known as "assistant conductors or ticket collectors" and provided rules governing the movement of employees between the brakeman class and the conductor class, these being the matters with respect to which the Conductors and the Trainmen had been in disagreement as regards their respective jurisdictional bargaining rights (see pp. 3, 6 above).

Following the agreement between the Railroad and the Trainmen, the Conductors continued to insist that they alone had the right, under the Railway Labor Act, to negotiate with the Railroad concerning these matters. However, having entered into an agreement with the Trainmen, the Railroad found itself unable to enter into a new and conflicting agreement with the Conductors on the same subjects. Thus a deadlock developed in the negotiation of rules governing the class of road conductors, and it was apparently for the purpose of breaking that deadlock that the Trainmen invoked the services of the Mediation Board to determine the authorized bargaining representative of the class of road conductors. Having assumed jurisdiction of this representation dispute, the Board held an election and certified the Trainmen as the duly accredited representative of road conductors.

All of the allegations in the complaint charging unlawful conduct on the part of the Railroad relate to the

facts of the jurisdictional dispute between the Conductors and the Trainmen, and to the consequences immediately following upon the Railroad's decision to make an agreement with the Trainmen. The ultimate basis of the complaint of the Conductors against the Railroad is simply that the Railroad negotiated with the Trainmen concerning matters with respect to which the Conductors claim, as against the Trainmen, to have had exclusive bargaining jurisdiction.

4. ARE THE CHARGES IN THE COMPLAINT WITH RESPECT TO COERCION AND INFLUENCE RELATE TO THE JURISDICTIONAL DISPUTE BETWEEN THE TWO RIVAL LABOR ORGANIZATIONS AND THEREFORE PRESENT NON-JUSTICIABLE ISSUES.

It is clear from a consideration of the charges of coercion and influence contained in the complaint that those charges relate entirely to the jurisdictional dispute between the Conductors and the Trainmen and that the whole course of conduct complained of constituted an integral part of that dispute and its immediate consequences.

That course of conduct consisted of the following alleged acts: (a) the completion and circulation among the employees of an agreement between the Railroad and the Trainmen after the withdrawal of the Conductors from the three-party negotiations (R. 14-15); (b) the alleged dilatory tactics on the part of the Railroad, and its asserted refusal to negotiate in good faith with the Conductors (R. 15-16); (c) the making and publication of an agreement between the Railroad and the Trainmen in settlement of claims filed by the Trainmen against the Railroad (R. 15); (d) the making of statements and representations by representatives of the Railroad in conference with representatives of the Conductors (R. 16).

1. Nature of the Acts Complained of.

With respect to the acts which are thus alleged by petitioners to have constituted unlawful coercion, influence and interference in the employes' choice of their representative, it should first be noted that all of these acts occurred in the course of, and as part of, the process of bargaining and negotiation that took place among the representatives of the two unions and the Railroad, and that none of them involved any contact by the Railroad with the individual conductors themselves, with the possible exception of the alleged publication of the two agreements between the Railroad and the Trainmen.

At the very most, the allegation of such conduct on the part of the Railroad amounts to no more, insofar as impact on the employes themselves is claimed, than a charge of persuasion of the employes that the Trainmen's organization constituted a better bargaining agent than did the Conductors' organization. This is evident from the petitioners' own language in their complaint, wherein they describe the "plan of action or program" undertaken by the Railroad and the Trainmen as being "designed to embarrass, discredit, and weaken the ORC and to assist and strengthen the BRT" (R. 14). Petitioners, apparently aware of a fundamental weakness in their position in this respect, do not in their brief speak of these acts as having constituted actual coercion upon the employes, but describe them as having "influenced" the employes as to their choice, apparently thus basing their claim of violation of Section 2, Third, on the "influence" portion of the phrase "interference, influence or coercion," as used in that Section. For example, petitioners in summarizing the acts complained of in their brief use the following language (petitioners' brief, p. 28): "Beginning August 3, 1942, Pennsylvania began engaging in conduct which, as Pennsylvania intended it would, *influenced* the craft of road conductors to believe their current representative, ORC, was a *less effective bargain-*

ing agent than BRT" (Emphasis supplied). Thus petitioners' contention now apparently is reduced to claiming that Section 2, Third, was violated because the Railroad engaged in conduct which "influenced," i. e., had a tendency to persuade the employes that the Trainmen's organization was a better bargaining agent than the Conductors' organization.

In taking this position, petitioners ignore the fact that this Court, in construing the phrase "interference, influence or coercion," pointed out in its decision in *Texas & N. O. R. Co. v. Clerks, supra*, that the meaning of the word "influence" must be gathered from its association in the statute with the words "coercion" and "interference"; and that the whole phrase plainly refers to "pressure, the use of the authority or power of either party to induce action by the other in derogation of what the statute calls 'self-organization';" and "the abuse of relation or opportunity so as to corrupt or override the will" (Emphasis supplied) (281 U. S. at page 568).

It is difficult to understand how acts of the character complained of by petitioners, such as the making of agreements between the Railroad and the Trainmen's organization, the publicizing of those agreements, and the making of statements and representations to representatives of the Conductors' organization in the course of bargaining negotiations with them, which are now described by petitioners as having merely "influenced" or tended to persuade the employes, can, in any fair or proper sense, be regarded as having corrupted or over-ridden the will of the employes in their exercise of the choice of a representative.* So far from having constituted overriding coercion, they were merely part of the ordinary processes of negotiation and of bargaining persuasion, and in that respect the bargaining processes here were not different from those which normally take place in collective bargain-

*See discussion quoted at pp. 10a-12a of the Appendix herein, from the Mediation Board's brief in the court below.

ing negotiations, especially where inter-union jurisdictional disputes are involved. Plainly, the acts here complained of as having constituted coercion were done in the course of and constituted an integral part of the bargaining negotiations among the two unions and the Railroad, and therefore came within the limits of the jurisdictional dispute between the two unions, which constitutes the basis of the present case.

2. All the Acts Complained of Constituted an Integral Part of the Jurisdictional Dispute.

Petitioners apparently concede that most of the acts complained of constituted part of the jurisdictional dispute—and therefore that the core of their case against the Railroad lies in their charge of violation of petitioners' alleged exclusive bargaining jurisdictional rights—because in their brief (pp. 15-16) only two of the acts in question are referred to—and then only briefly—as lying outside of the inter-union jurisdictional dispute. The first of these two is the making and publication of the agreement between the Railroad and the Trainmen for the settlement of claims filed by the Trainmen with the National Railroad Adjustment Board against the Railroad, and the second is the claimed failure of the Railroad to confer and negotiate promptly and in good faith with the Conductors, following the withdrawal of the latter from the three-party negotiations (R. 14-16).

With regard to the first of these two alleged acts now relied on by petitioners as not constituting a part of the jurisdictional dispute, and as therefore placing their complaint outside the scope of the *M-K-T* and *Southern Pacific* cases, it is clear that the settlement of the claims of the Trainmen was a part of the agreement made by the Railroad with the Trainmen for the purpose of ending the jurisdictional controversy between the rival unions, and thus avoiding the impasse in which that con-

troversy had placed the Railroad. Petitioners cannot be attempting in this case to assert as a legal proposition that a railroad is forbidden by law to make an agreement with a duly accredited representative of railroad employees in settlement of claims made by that representative on behalf of those employees. Petitioners' essential objection to this settlement agreement lies merely in the alleged fact that the advantage, accruing to the Railroad from the settlements constituted the consideration offered by the Trainmen in return for the Railroad's purported decision to acquiesce in the Trainmen's claims in the jurisdictional dispute.* As such, the charge with reference to the settlement of claims is an integral part of the petitioners' contention that their jurisdictional bargaining rights were violated.

With respect to the only other alleged act, or series of acts, claimed by petitioners as lying outside the jurisdictional dispute, viz., that involved in the charge that the Railroad delayed negotiations with the Conductors and failed to bargain in good faith with representatives of that organization, that series of acts constitutes merely one more of the many integral factors in the jurisdictional dispute. The only specific charge of delay in negotiations set forth in the complaint is to the effect that the Railroad did not hold any conferences with the Conductors between July 24, 1942, and August 27, 1942, yet the complaint

* It is plain from Paragraph 33 of the Complaint that the basic objection to the agreement in settlement of claims lies in the fact that that agreement allegedly constituted the consideration for the Railroad's willingness to agree with the Trainmen in the jurisdictional dispute. That paragraph reads in part (R. 16-17):

"The Penn RR agreed to the said unlawful plan of action * * * to secure a commitment from the RRT to adjust time claims of road brakemen, pending before the First Division of The National Railway Adjustment Board, at greatly reduced amounts."

It is a well settled rule that general allegations in a complaint must be read in the light of and construed as limited by the complaint's specific allegations on the same subject. See, e. g., *Standard Refining Co. v. Stevens*, 123 F. 2d 186 (C. C. A. 8th, 1941), cert. den, 315 U. S. 204; *Trachtman v. Connelly*, 106 F. 2d 501 (C. C. A. 6th, 1939).

shows (R. 7, 15) that the Conductors' representatives by their own action broke up the three-party negotiations by withdrawing from them on August 3, 1942, thereby effecting a change in the relationship between the parties which had existed for a score of years.

Furthermore, the complaint shows that the Railroad did not refuse to confer or negotiate with the Conductors, because the Railroad's representatives did meet with those of the Conductors on August 27, 1942, within a few weeks after the Conductors' withdrawal from the three-party negotiations and shortly after the conclusion of the negotiations which had continued between the Railroad and the Trainmen subsequent to the Conductors' withdrawal (R. 15, 29). Plainly, such failure as there was, during that short period, to hold a conference between the Conductors and the Railroad's representatives was the direct result of the disrupting influence on the relations between parties which was brought about by the jurisdictional dispute between the two unions and the Conductors' withdrawal from the negotiations.

The charge against the Railroad of delaying negotiations with the Conductors is thus merely an attempt to place upon the Railroad the onus of the Conductors' own actions, whereas the fact is apparent that such slight delay as there was arose out of the jurisdictional dispute which the Conductors were at that time having with the Trainmen.

To the extent that this charge of the petitioners alleges a failure on the part of the Railroad to bargain in good faith with the Conductors; it is simply a charge that the Railroad failed to acquiesce in the Conductors' claims as to their alleged bargaining jurisdictional rights, and instead acquiesced in the opposing claims of the Trainmen (R. 12). The charge of lack of good faith in bargaining with the Conductors plainly relates to the jurisdictional dispute.

It is therefore clear, from a study of the allegations

in the complaint and from the petitioners' argument in their brief in this Court, that all the charges in the complaint against the Railroad relate to the jurisdictional dispute between the Conductors and the Trainmen, and that the acts charged constituted in fact integral phases of that dispute and its immediate consequences. To state it another way, the entire course of conduct and of dealings among the Conductors, the Trainmen and the Railroad which is described in the complaint constitutes one whole and indivisible pattern of bargaining and negotiating relations among the parties with respect to the respective jurisdictional bargaining rights of the two unions, centering upon the specific dispute between the two unions, the impasse in which that dispute placed the Railroad, and the immediate consequences whereby that impasse was avoided and the dispute ended.

3. Since All the Acts Complained of Constituted Part of the Jurisdictional Dispute, the Issues Here Presented Are Non-Justiciable Under the M.-K.-T. and Southern Pacific Decisions.

It follows that the controversy here presented is in all its essentials merely a familiar form of jurisdictional dispute between two rival railroad labor organizations. The case thus consists of a jurisdictional dispute of the same type and character as those involved in the M.-K.-T. case and the Southern Pacific case. Speaking of such disputes, this Court said in the M.-K.-T. case (at pp. 334-7, of 320 U. S.):

"It is true that the present controversy grows out of an application of the principles of collective bargaining and majority rule. It involves a jurisdictional dispute—an asserted overlapping of the interests of two crafts. It necessitates a determination of the point where the authority of one craft ends and the other begins or of the zones where they have

joint authority. * * * Congress did not attempt to make any codification of rules governing these jurisdictional controversies. It did not undertake a statement of the various principles of agency which were to govern the solution of disputes arising from an overlapping of the interests of two or more crafts. It established the general principles of collective bargaining and applied a command or prohibition, enforceable by judicial decree to only some of its phases. * * *

*"It seems to us plain that when Congress came to the question of these jurisdictional disputes, it chose not to leave their solution to the courts. * * **

Rather the conclusion is irresistible that Congress carved out of the field of conciliation, mediation and arbitration only the select list of problems which it was ready to place in the adjudicatory channel. All else it left to those voluntary processes whose use Congress had long encouraged to protect these arteries of interstate commerce from industrial strife. The concept of mediation is the antithesis of justiciability."
(Emphasis supplied.)

The issues raised by the petitioners' complaint in the instant case fall squarely within the principle laid down by this Court in the language quoted above in the *M.-K.-T.* case and the *Southern Pacific* case. There is here "an asserted overlapping of the interests of two crafts," and, although the petitioners contend that the actions of the Railroad in dealing with the jurisdictional dispute between the Conductors and the Trainmen constituted unlawful coercion and interference with the class of road conductors in their choice of a representative, a decision on those charges of coercion and interference plainly "necessitates a determination of the point where the authority of one craft ends and the other begins."

The parallel to the *Southern Pacific* case is practically a perfect one. There, as here, one railroad labor organization, the Engineers, claimed that an agreement between the Railroad and another organization, the Firemen, infringed the alleged bargaining rights of the Engineers' organization because it included provisions with respect to persons in the class of engineers (pp. 339-340 of 320 U. S.). There, as here, the contentions of the opposing parties were carried to the point where it was argued that a contract between the Railroad and one of the unions, giving that union the exclusive right to represent engineers with respect to the matters in question, would in effect coerce all engineers into joining that union instead of the other union, and would therefore result in a violation of Section 2, Third, and 2, Fourth, of the Railway Labor Act.* This Court nevertheless held that the issues presented were not justiciable saying (at pp. 343-4 of 320 U. S.):

"We are concerned only with a problem of representation of employees before the carriers on certain types of grievances which, though affecting individuals, present a dispute like the one at issue in the *Missouri-Kansas-Texas R. Co.* case. It involves, that is to say, a jurisdictional controversy between two unions. It raises the question whether one collective bargaining agent or the other is the proper representative for the presentation of certain claims to the employer. It involves a determination of the point where the exclusive jurisdiction of one craft ends and where the authority of another craft begins. For the reasons stated in our opinions in the *Missouri-Kansas-Texas R. Co.* case and in the *Switchmen's* case, we believe that Congress left the so-called jurisdictional

* "They point out that §2, Third and Fourth prohibit the carrier from influencing employees in their choice of representatives. The argument is that a contract by the carrier with the Engineers giving the latter the exclusive right to represent engineers in the presentation of their individual claims would in effect coerce all engineers into joining that union in violation of §2, Third and Fourth." (320 U. S. at p. 342.)

controversies between unions to agencies or tribunals other than the courts. We see no reason for differentiating this jurisdictional dispute from the others." (Emphasis supplied.)

This language is exactly applicable to the case at bar. Plainly, the non-justiciable character which the Court there attributed to issues raised by a jurisdictional controversy between two unions is absolute and admits of no exceptions, such as those now urged by petitioners.

B. PETITIONERS' ARGUMENTS IN ATTEMPTING TO AVOID THE EFFECT OF THE M.-K.-T. AND SOUTHERN PACIFIC CASES WOULD IF SUSTAINED NULLIFY THE PRACTICAL SIGNIFICANCE OF THOSE CASES, BECAUSE THEY WOULD ENABLE A LABOR ORGANIZATION DISAPPOINTED IN ITS BARGAINING EFFORTS TO DRAG ITS CONTROVERSY WITH A RIVAL LABOR ORGANIZATION AND THE RAILROAD INTO THE COURTS BY MERELY ATTACHING THE LABEL OF COERCION TO THE BARGAINING ACTIONS OF THE RIVAL ORGANIZATION AND THE RAILROAD.

From their brief filed in this case, it becomes clear that the petitioners are arguing that, although the federal courts have not been given the power to resolve jurisdictional disputes, it is only necessary to assert that the actions of the Railroad in connection with that dispute constituted coercion and interference in order to place the jurisdictional controversy before the courts. In substance, petitioners are contending that the courts may now accomplish by indirection what the *M.-K.-T.* and the *Southern Pacific* cases specifically held they could not accomplish directly.

1. The Charges in the Present Case Cannot be Adjudicated Without a Determination by the Courts as to the Respective Bargaining Jurisdictions of the Conductors and the Trainmen.

In following their line of argument in this respect, petitioners first contend that, in order to grant them the

requested relief, it is not necessary to determine the respective bargaining jurisdictions of the two unions or to decide whether or not the agreement which the Railroad made with the Trainmen constituted an unlawful infringement upon the Conductors' asserted bargaining jurisdiction. In order to reach this conclusion, petitioners assert that the only proof necessary to establish unlawful interference and coercion by the Railroad is proof that an action by the Railroad did, as a matter of fact, "influence" or have a tendency to persuade certain employes in their choice of a representative. It is stated that the only possible defense open to the Railroad, once such action is proven, is to show that the Railroad was required by law to take that action (petitioners' brief, p. 18). Thus, on the basis of the fact, which the Railroad admits, that the Railroad was not required by law to make the specific agreements which it did make with the Trainmen, petitioners conclude that they need only show that the agreement between the Railroad and the Trainmen had some actual "influence" or persuasive effect on one or more individual road conductors in their choice of a representative, in order to establish a violation of Section 2, Third.

It is, of course, true that one who asserts illegal interference and coercion by a railroad need not show that the actions of the railroad in question constituted a violation of law apart from and in addition to the asserted violation of the legal right of employes to be free from interference and coercion. But it is plain, under the Railway Labor Act, that the making of a collective bargaining agreement between a railroad and one labor organization cannot, of itself, constitute the basis for a charge of interference and coercion by the railroad of a class of employes represented by another labor organization, unless it is also shown that the agreement is in some way unlawful and violative of the legal rights of such employes or of such other labor organization. Otherwise, collective bar-

gaining in the railroad industry would become impossible because the railroads would be required to assume the risk that any one or more of the provisions of the ultimate collective agreement might be made the basis of a charge that such provisions had some "influence" upon the opinions of employes represented by another labor organization and therefore constituted a violation of Section 2, Third. Again, it seems obvious that Congress never intended to protect the rights guaranteed by Section 2, Third, at so heavy and unnecessary a price in the disruption of normal labor relations in the railroad industry.

2. A Determination in this Case as to the Respective Bargaining Jurisdictions of the Conductors and the Trainmen Cannot be Made Unless the M.-K.-T. and Southern Pacific Decisions are Overruled or Practically Nullified.

Petitioners go on to contend in their brief (at pp. 19-21) that, even though a decision for petitioners in the instant case would require a finding by the District Court that the Railroad had violated the Conductors' asserted bargaining jurisdiction in concluding the agreement with the Trainmen, the *M.-K.-T.* and *Southern Pacific* cases do not prevent such a determination by the courts in this case. They reach this conclusion by two lines of argument, the first being to the effect that the *M.-K.-T.* and *Southern Pacific* cases do not mean what they say, and the second being that those cases can be distinguished from the present case.

On the first point, they suggest to this Court that, in giving effect to the decisions in the *M.-K.-T.* and *Southern Pacific* cases in this case, this Court would be impairing the right of employes to select their representatives without interference and coercion by enabling a railroad to interfere with and coerce its employes at will, so long as such coercion takes the form of a violation of the jurisdictional bargaining rights of the statutory representative of those employes, and that therefore a dispute regarding

bargaining jurisdiction must be determined by the courts whenever a charge of coercion is involved therein. This argument is, of course, merely a thinly disguised suggestion to this Court that it now overrule the *M.-K.-T.* and *Southern Pacific* cases.

The chief principle upon which those cases were decided was that there exists no legal criteria by which the courts can determine what are the jurisdictional bargaining rights of various bargaining representatives of employees. That principle is eminently sound and practical, and it applies whether or not a charge of coercion is made. If it stands, there exists no way in which the courts may decide jurisdictional disputes, and the petitioners' arguments, with respect to the practical necessity of deciding such disputes in order to determine whether or not coercion has taken place, do not provide any basis for such decision. Furthermore, if the federal courts are unable to determine what is and what is not a violation of the so-called jurisdictional rights of a railroad labor organization, it seems clear that a railroad company could not do so, whether coercion is charged or not. Petitioners are simply contending, therefore, that a legal duty should be placed upon railroads to refrain from violating rights which no court can define. That Congress had no such novel intention in enacting Section 2, Third, of the Railway Labor Act seems too obvious to require extended discussion.

The final effort put forth by the petitioners in their brief to persuade this Court to the conclusion that the jurisdictional dispute in this case is justiciable consists of the argument that this case can be distinguished from the *M.-K.-T.* and *Southern Pacific* cases. They attempt to do this by saying that in the *M.-K.-T.* and *Southern Pacific* cases the jurisdictional rights of the respective labor organizations were the only legal rights involved, whereas in this case the judicial determination of the Conductors' jurisdictional rights is incidental but necessary

to the enforcement of Section 2, Third" (petitioners' brief, p. 20), involving the right of individual employees to be free from interference and coercion. This purported distinction does not of course serve to differentiate the present case from the *Southern Pacific* case, where a similar argument, based on Section 2, Third and Fourth, and the alleged danger of infringement of employees' rights thereunder, was made but was of no avail (see page 56 above, and passage quoted in footnote thereon from the *Southern Pacific* case). Moreover, the petitioners' contention in this respect is based ultimately upon the unwarranted assumption that this Court in the *M-K-T.* and *Southern Pacific* cases could have readily determined the limits of the jurisdictional bargaining rights of the labor organizations involved, but merely chose not to do so because Congress did not intend to have those rights enforced in the courts. This assumption ignores the fact that this Court pointed specifically to the failure of Congress in the Railway Labor Act to establish any such jurisdictional rights as legal rights of employee representatives.

In the final analysis, petitioners in this connection are attempting, by an exercise of legal sophistry, to assert that the *M-K-T.* and *Southern Pacific* cases have placed no limit on the jurisdiction of the federal courts which cannot be avoided by a simple variation in the charge against a railroad, namely, by charging, not that the railroad by its actions violated the jurisdictional rights of a labor organization, but that those same actions violated the right of employees to be free from interference and coercion. It is perfectly apparent that the petitioners have not grasped the substance of the decisions in the *M-K-T.* and *Southern Pacific* cases and merely regard them as establishing limitations on the forms of pleading a case.

Fundamentally, the petitioners are attempting to distinguish the *M-K-T.* case and the *Southern Pacific* case.

by the same sort of reasoning by which they attempt to distinguish the *Switchmen's Union* case. Their ultimate contention is simply that the federal courts may accomplish indirectly an adjudication of a jurisdictional dispute, though by direct action such disputes are not justiciable. If the petitioners are correct in their contention, that a jurisdictional dispute is justiciable so long as it is presented to the courts as a matter of coercion and influence by a railroad, it appears certain that all such disputes will ultimately find their way into the courts, because in the case of every such dispute the disgruntled union will allege coercion in order to make its way into court. If such a contention meets with success, then the *M.-K.-T.* case and the *Southern Pacific* case will cease to have practical significance as interpretations of the Railway Labor Act.

III. Independently of the Switchmen's Union, M.-K.-T. and Southern Pacific Decisions, Petitioners' Attempt to Obtain Relief in This Court Must Fail Because Their Failure to Appeal from the Lower Court's Dismissal of the Suit against the Mediation Board has Made That Dismissal, and Therefore the Board's Certification, Final and Unreversible, with the Result that Petitioners have no Standing to Represent the Employees in Question Either in Bargaining Negotiations or in Pressing This Law Suit, and the Case Has Therefore Become Moot.

Entirely apart from and independently of the decisions of this Court in the *Switchmen's Union*, *M.-K.-T.* and *Southern Pacific* cases, there is a conclusive answer to the petitioners' attempt in this Court to obtain the relief which they ask, in that there is no possible way, in the present state of the case, for this Court or any other court to grant petitioners the relief sought in this proceeding. This results from petitioners' failure to name the Board as a respondent in this Court.

In the last analysis, petitioners are seeking to have the Board's action in certifying the Trainmen as the accredited representative of road conductors on the Pennsylvania Railroad annulled and set aside. No other result would be of any value to them, and no form of words which they use can disguise that fact. Indeed, it is plainly admitted in their brief.* This is necessarily so, because, under the provisions of Section 2, Ninth, of the Act, the Railroad is commanded to "treat with" the representative certified by the Board for the purpose of bargaining with respect to the class of employees for whom the representative has thus been certified. So long as the Board's certification stands, the Railroad would be guilty of a violation of its statutory duty if it entered into negotiations with any organization other than the Trainmen, with respect to the class of road conductors.

It follows, therefore, that if the Board's certification cannot be nullified or set aside, the courts are powerless to grant to petitioners the relief which they seek.

But it is clear that, in the present state of the case, the Board's certification has become final and unassailable so far as this proceeding is concerned, and this would be true even if the *Switchmen's Union*, *M-K-T*, and *Southern Pacific* decisions had not been made. Petitioners, fully aware of the necessity for them of having the Board's certification set aside, quite properly named the Board as a party defendant in the District Court for

* Thus, petitioners say (p. 30 of their brief) that "the annulment of the election and certification of BRT as the conductors' representative is the only relief that will effectively vindicate the conductors' right to a free choice." Petitioners even go to the extreme of asking not merely that the judgment of the Court of Appeals be reversed, but that that court be instructed by this Court to enter a judgment reversing the judgment of the District Court which dismissed the complaint for failure to state a cause of action (Petitioners' Brief, p. 31). This request of petitioners, for a determination by this Court of the whole merits of the case, is made in disregard of the fact that the Court of Appeals has not yet passed on the merits of the case, and that the case is not before this Court for full argument on the merits.

that purpose. If they had not done so, there would have been no possibility of compelling the Board, by judicial action, to change its determination. The Board continued as a party in the Court of Appeals. The Court of Appeals dismissed the petitioners' suit against the Board, as well as its suit against the other defendants. Petitioners have not named the Board as a respondent in this Court.

This failure of petitioners to bring the Board before this Court has the following consequences. The absence of the Board as respondent in this Court means that petitioners have not appealed from the Court of Appeals' dismissal of the suit with respect to the Board, and accordingly that dismissal has now become final and un-reversible. Therefore the Board is not only not before this Court but is out of the proceeding altogether, and would not be before the courts below if the case were sent back to them for further action. Accordingly, the basis for any order by this Court or by the courts below against the Board, requiring it to change its certification or hold a new election or take any other action, is entirely removed, because, with the Board no longer in the proceeding, there is no way in which this Court or any of the courts below could enter an order requiring action by the Board. The Board's certification has therefore become immune to judicial action in this case.

Even if this Court should see fit to reverse the judgment of the court below with respect to the Railroad and the Trainmen, it has no power, under the statutes governing appeals and proceedings on writs of certiorari, to reverse the dismissal with respect to the Board, since no appeal from that dismissal has been taken, and the time allowed by the statute for petitioning for such an

* See pp. 22-23 above, where it is shown that, in the case of *North Dakota v. Chicago & N. W. Ry. Co.*, 257 U. S. 485 (1922), this Court decided that it should not enter a decree, contrary to the order of an administrative body, when that body was not before the Court and therefore would not be bound thereby.

appeal, has now passed.* Accordingly, the Court of Appeals' dismissal of the suit with respect to the Mediation Board has become *res judicata* in this case and is not reversible, with the result that there is no way of compelling the Board to change its certification and that certification now stands as judicially unassailable, so far as this proceeding is concerned.

It follows inevitably that the whole controversy has now become moot. The Trainmen's organization stands as the statutory representative of the class of road conductors on the Pennsylvania Railroad. All bargaining and negotiation with respect to that class must under the statute be with the Trainmen. Even if the agreement already made between the Trainmen and the Railroad were held to be unlawful and invalid, as petitioners' complaint requests, any future agreements with respect to road conductors, as well as with respect to yard conductors and brakemen, on the Pennsylvania Railroad would still have to be between the Railroad and the Trainmen. The Conductors' organization has no standing to represent road conductors or any other class of employes on the Pennsylvania Railroad, either in bargaining negotiations or in a law suit such as the present one.

In these circumstances, to grant any of the petitioners' prayers for relief would not only amount to a recognition of a right which petitioners no longer have—the right to represent road conductors on the Railroad—but would also constitute an idle and bootless gesture. A declaratory judgment as to the respective rights of the

* The Act of February 13, 1925, c. 229, §§ (43 Stat. 940, 28 U. S. C. 350) provides: "No appeal or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree." The judgment of the Court of Appeals below was entered on March 27, 1944 (R. 117), so that the three-months' period has long since expired. In *Hartford Accident & Indemnity Co. v. Bunn*, 285 U. S. 169 (1932), this Court, referring to the above statutory provision, said (p. 178): "Passage of the three months' period extinguished the right to grant an appeal." (Emphasis supplied.)

parties with regard to the jurisdictional claims of the two unions, or with respect to the agreements of the parties, would be pointless because new negotiations and agreements concerning the subjects in which petitioners are interested would nevertheless have to be limited to the Trainmen, to the exclusion of the petitioners. Similarly, a declaratory judgment or an injunction with respect to the alleged acts of coercion in the employees' choice of a representative would be futile because there is no possibility in this proceeding of compelling a new election and all the acts complained of are in the past and are not in any way alleged as continuing.

Accordingly, petitioners' failure to name the Board as a respondent in this Court has removed all basis for granting the relief which they ask. For this reason alone, wholly independently of the other reasons stated in this brief, the petitioners' appeal in this Court must be denied and the judgment of the court below affirmed.

CONCLUSION.

From the foregoing analysis, it is clear that there are four fundamental reasons why the judgment of the Court of Appeals below should be affirmed.

1. Under the *Switchmen's Union* decision, a certification issued by the Mediation Board under the Railway Labor Act is final and not subject to judicial review, and therefore petitioners cannot obtain from the courts in this proceeding a nullification of the certification here involved, as they must do if they are to be given the relief sought.

2. Independently of the *Switchmen's Union* decision, judicial enforcement of the right here invoked by petitioners, of employees to be free from coercion in their choice of a representative is limited to proceedings brought under Section 2, Tenth, of the Act by United

States attorneys under the direction of the Department of Justice, and this is not such a proceeding.

3. The facts, relied upon by petitioners as the basis for their complaint constitute merely a familiar form of inter-union jurisdictional dispute, and this Court has held, in the *M-K-T.* and *Southern Pacific* cases, that such controversies are not justiciable.

4. Independently of the *Switchmen's Union, M-K-T.* and *Southern Pacific* decisions, neither this Court nor any other court can, in this proceeding, grant petitioners the relief sought, because petitioners have failed to appeal from the lower court's dismissal of their suit with respect to the Mediation Board, with the result that that dismissal has now become final and unreversible, and the Board is no longer in the proceeding, so that there is no way of compelling the Board to change its certification in this case; and accordingly the case has become moot.

For all these reasons, it is submitted that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX.

A. *Excerpts from the Railway Labor Act.*

(Act of May 20, 1926, as amended by Act of June 21, 1934,
45 U. S. C., Sec. 151, *et seq.*)

"GENERAL PURPOSES.

"Sec. 2. The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

"GENERAL DUTIES.

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to

confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

“Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

“Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an em-

ployee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

"Tenth. The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than \$1,000 nor more than \$20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act: nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent."

*B. Excerpts from Brief for Mediation Board in Court of Appeals Below.**

"SUMMARY OF ARGUMENT.

I.

"A. The motion for summary judgment was properly denied. This motion was based on the theory that the

* A copy of this brief is lodged with the clerk of this Court.

Mediation Board's certification and election were invalid because the Board had failed to perform its statutory duty to investigate, hear, and determine the validity of charges of carrier misconduct made to it before the election by appellants. But under the Act the Board is required to investigate and make determinations only where there are disputes as to whether the employee representatives are designated in accordance with the requirements of the Act. The only requirement as to designation of representative contained in the Act is that in Section 2, third, which states that representatives shall be designated without carrier coercion. The charges of carrier coercion made to the Board here did not, even if true, reasonably relate to the designation of representatives, and therefore the Board was not required to investigate their truth.

"B. Even if the Board should have investigated such charges, the court was not required to remand the case to the Board for that purpose but could pass upon the issues itself. The primary administrative jurisdiction doctrine does not apply here, because the court accepted the facts as stated and the only issues before the court were legal rather than factual.

II.

"The court also properly dismissed the complaint because the facts stated therein, which were treated by the court as true, did not allege unlawful coercion within the meaning of Section 2, third. These facts were the same as those alleged in the complaint to the Board and therefore likewise did not relate to coercion in connection with the designation of representatives, the only kind of coercion forbidden by that section. The allegations, furthermore, do not charge coercion within the meaning placed upon that term in this connection by the Supreme Court, since the conduct described was obviously not such as to override the will of an employee desiring to vote for

O.R.C. and cause him to vote for B.R.T." (From pages 9-10 of brief.)

"We prefer, however, to support the Board's decision that it lacked authority to investigate, hear, and determine these charges on a somewhat broader ground, a ground admittedly not the one mentioned in the Board's letter. The right to do so cannot be successfully challenged. For it is a familiar rule of appellate practice that where an administrative body, just as a trial court, reaches the correct result on the admitted facts, even though on an erroneous legal ground, its decision must be affirmed on appeal. *Helvering v. Gowran*, 302 U. S. 238, 245-246; *Securities Comm. v. Chenery Corp.*, 318 U. S. 80, 88. The ground for affirmance which we now advance is that the Board's duty is only to investigate whether employee representatives are designated and authorized without carrier coercion, and not to investigate whether other provisions of Section 2 not relating to designation and authorization of representatives have been violated. And we shall show that the charges of carrier coercion made to the Board on behalf of O.R.C. did not, even if accepted as true, relate to designation of employee representatives, and were thus not such as the Board was required to investigate in order to ascertain if they were well-founded.

"The express language of Section 2, ninth and tenth, clearly reveals that Congress intended the Board to have only a limited investigatory function and intended the general police power to enforce the provisions of the Railway Labor Act to be lodged instead with the United States Attorneys acting in the federal courts. Section 2, ninth, by its first sentence gives the Board power to investigate only disputes as to who are the representatives designated and authorized in accordance with the requirements of

this Act.¹⁰ While the various paragraphs of Section 2 impose numerous requirements upon the carriers, only paragraph third imposes any requirement with respect to the "designation and authorization of representatives." This paragraph requires that representatives be designated without carrier interference, influence, or coercion.¹¹ The other requirements concern entirely different activities, such as collective bargaining, filing of notices and the like. The United States Attorneys acting in the federal courts, on the other hand, in Section 2, tenth, were given the much broader authority to bring all necessary proceedings for the enforcement¹² of the Act, and violation of the third, fourth, fifth, seventh, or eighth paragraphs of Section 2 was specifically made a misdemeanor.

"The limited scope of the Board's authority to investigate and make determinations concerning illegal practices of carriers is clearly demonstrated, too, when the Railway Labor Act is contrasted with the National Labor Relations Act (49 Stat. 449, 29 U. S. C. sec. 151-166). The National Labor Relations Board is there

¹⁰ That the Board's investigatory authority relates only to the designation of representatives is also indicated by the following sentence in Section 2, ninth:

"In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier."

¹¹ Apparently appellants before the Board were relying on this paragraph since their letter to the Board stated (App. 31):

"An election at this time could not be said to be open 'without interference, influence, and coercion exercised by the carrier'."

¹² Joseph B. Eastman, then federal coordinator of transportation, who appeared before the Senate Committee on Interstate Commerce in support of the bill which became the present Railway Labor Act of 1934 made the following statement in this connection before that Committee (Hearings on S. 3266, 73d Cong. 2d Sess., April 10, 1934, p. 14):

"Enforcement involves nothing but the determination of the facts, and for this reason it has in S. 3266 been definitely placed, where it belongs, in the hands of the Department of Justice."

specifically authorized after complaint and hearing to prevent employers from carrying on certain unfair labor practices (29 U. S. C. sec. 160). The unfair labor practices are specifically defined¹³ and relate to activities not necessarily involving the designation of representatives (29 U. S. C. sec. 158). And the latter Board is specifically given the power to issue orders to employers and to subpoena witnesses (29 U. S. C. secs. 160, 161), powers which the Mediation Board completely lacks, and tools which are essential to the exercise of any extensive investigatory, hearing, or enforcement functions.

"We submit therefore that the Mediation Board is required to investigate and make a determination only as to charges that a carrier is coercing its employees with respect to the designation of their representatives as forbidden by Section 2, third. Can it reasonably be said that the specific charges of coercion made to the Board by appellants against the carrier here, even if they were accepted as true, fall within this category? We think not, and therefore we think that the Board properly refused to investigate, hear, or make any determination with respect to the truthfulness of these charges.

"Both the letter of appellants to the Board and the complaint before the court charge two general types of misconduct. In the first place, it is charged that the carrier bargained collectively and entered into a collective agreement with the B.R.T., and refused to bargain collectively with the O.R.C. as to certain matters alleged to

¹³ They include:

1. Interference with employees in their right to organize and bargain collectively through representatives of their own choosing.
2. Domination of the formation or administration of a labor union.
3. Encouraging or discouraging membership in a labor union by discrimination in regard to hire or tenure of employment.
4. Discrimination against an employee because he files charges or gives testimony under the Act.
5. Refusal to bargain collectively with the representatives of the employees."

be within the exclusive bargaining jurisdiction of the O.R.C. as the representative of the road conductors. Secondly, it is charged that the carrier in negotiations with the O.R.C. sought by various means to coerce it into the acceptance of rules and working conditions not satisfactory to it.

"The first charge is merely one that the carrier has failed to bargain collectively with the representatives of a particular craft or class but has bargained instead with the representatives of another craft as to certain work alleged to be within the bargaining jurisdiction of the first craft. Such a jurisdictional dispute as to whether certain work belongs to one craft or another clearly does not relate to the designation of employee representatives of any craft, as this court has but recently held in *Brotherhood of Railroad Trainmen v. National Mediation Board*, 135 F. (2d) 780, 76 App. D. C. . . . The charge in any event relates to the obligation to bargain collectively, an obligation entirely different from the one upon the carrier not to interfere with the designation of employee representatives.

"The alleged coercion of the second type was by O.R.C.'s own statement directed to the O.R.C. bargainers rather than to the employees, and related merely to the drafting of the collective bargaining contract rather than to the designation of representatives. There is nothing in the Act which empowers either the Board or the courts to prevent a representative of either party from exerting the ordinary selfish 'pressure' of human nature upon the representative of the other in an effort to secure a contract most advantageous to the pressure user's party. Coercion in contract negotiation is an entirely different thing from coercion in connection with the choice of the representatives who are to do the negotiating. Only the latter is forbidden by this Act." (From pages 13-16 of brief).

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"Little more need be said here to show that the complaint did not allege a violation of Section 2, third, than has already been said with respect to the charges made by appellants in their letter to the Board. The charges in the complaint are the same as were made in the letter of appellants to the Board. And it has already been proved that the charges concerning the two types of misconduct referred to in the letter did not, even if accepted as true, establish a violation of section 2, third, because they did not involve coercion with respect to the designation of employee representatives.

"We need only add that the complaint does not charge 'interference,' 'influence,' or 'coercion,' as those terms have been construed in the only Supreme Court decision dealing with the meaning of section 2, third." In *Texas & N. O. Ry. Co. v. Ry. Clerks*,¹⁸ 281 U. S. 548, 568, that Court said:

"The intent of Congress is clear with respect to the sort of conduct that is prohibited. "Interference" with freedom of action and "coercion" refer to well-understood concepts of the law. The meaning of the word "influence" in this clause may be gathered from the context. *Noscitur a sociis. Virginia v.*

"17 Though the Supreme Court was there actually considering the language of the Railway Labor Act of 1926, that language was declared by Commissioner Eastman in the hearings on the 1934 act to be 'the same in principle as the section in the present act.' He further read the above quotation as indicating the meaning of the terms now employed. *Hearings on H. R. 7460, 73d Cong., 2d Sess., before House Committee on Interstate and Foreign Commerce, May 22, 1934, pp. 22, 25.*"

"18 Though the particular carrier conduct in that case was condemned as a violation of that section, there is no similarity between such conduct and that of the carrier here. There the carrier actively organized a company union; permitted its employees who were active in promoting the development of the union to devote their time to that enterprise without deduction from their pay; allowed to be charged to it the expenses incurred in recruiting members in the union; had reports made to it as to the progress of the recruiting; and discharged from its service and revoked the passes of certain leading representatives of an opposing independent union. (281 U. S. 548, 5600)."

Tennessee; 148 U. S. 503, 519. The use of the word is not to be taken as interdicting the normal relations and innocent communications which are a part of all friendly intercourse, albeit between employer and employee. "Influence" in this context plainly means pressure, the use of the authority or power of either party to induce action by the other in derogation of what the statute calls "self-organization." *The phrase covers the abuse of relation or opportunity so as to corrupt or override the will*, and it is no more difficult to appraise conduct of this sort in connection with the selection of representatives for the purposes of this Act than in relation to well-known applications of the law with respect to fraud, duress, and undue influence." (Italics supplied.)

"It is evident from this quotation that the carrier coercion forbidden by the Act is such as is likely to corrupt or override an employee's will in making his choice of representative. This concept appears to contemplate at least the making of threats or promises of reward by the carrier to the employees involved to induce them to choose one union rather than another. It is significant that there is nothing of this nature in the present picture. All that is alleged in the complaint here is that the carrier as to certain work bargained and contracted with B.R.T. rather than O.R.C., and also attempted in negotiations involving other work to coerce the O.R.C. bargainers to accept contract provisions unfavorable to the O.R.C.

"The numerous cases cited by appellants under the National Labor Relations Act (Br. 14) in support of their contentions that such conduct amounts to a violation of Section 2, third, clearly do not support them. These cases not only involve conduct entirely different from and more

egregious than the present, but also provisions¹⁹ in the National Labor Relations Act not comparable to Section 2, third. In fact, recent decisions indicate that even under the broader language of the National Labor Relations Act an employer may without violating the Act go much further than the carrier did here, and may even express a recommendation to his employees as to what union they should select, so long as such recommendation is not coupled with intimidation. *N. L. R. B. v. Virginia Porter Co.*, 314 U. S. 469; *N. L. R. B. v. American Tube Bending Co.*, 134 F. (2d) 993 (C. C. A. 2), cert. den., October 18, 1943, 64 S. Ct.

"Since these acts were not in violation of Section 2, third, as contended by appellants, the district court properly dismissed their complaint and refused to set aside the election. And since, as a result of that election, they were officially displaced by the B.R.T. as the representatives of the road conductors, they were not entitled to have set aside any of the provisions of the contract theretofore entered into between the carrier and the B.R.T. or to any other relief." (From pages 19-22 of brief.)

¹⁹ Many of these cases involve the provision in Section 8 of that Act making it an unfair labor practice to refuse to bargain collectively with the authorized employee representative. There is, of course, no such provision in Section 2, third, of the Railway Labor Act.

SUPREME COURT OF THE UNITED STATES.

No. 200. — OCTOBER TERM, 1944.

Order of Railway Conductors of Amer-	On Writ of Certiorari
ica, H. W. Fraser, as President of the	to the United States
Order of Railway Conductors of Amer-	Court of Appeals for
ica, et al., Petitioners,	the District of Co-
vs.	lumbia.
The Pennsylvania Railroad Company and	
Brotherhood of Railroad Trainmen.	

[December 11, 1944.]

Mr. Justice ROBERTS delivered the opinion of the Court.

This is a suit for a declaratory judgment and for an injunction brought by the Order of Railway Conductors of America, an unincorporated association of railway employees, against the National Mediation Board, two of its members, the Pennsylvania Railroad, and a subsidiary railroad company, and the Brotherhood of Railroad Trainmen, an unincorporated association of railway employees. For the sake of brevity, the plaintiffs will be called "plaintiff"; the National Mediation Board and its members "board"; the two railroads "railroad"; and the Brotherhood of Railroad Trainmen "trainmen".

The complaint, after stating the capacity of the parties, makes the following allegations, which as will appear, are for purposes of decision, to be taken as true. The plaintiff is, and for years has been, the accredited representative and bargaining agent for the craft of road conductors of the railroad, and the trainmen the representative and agent of road brakemen, yard conductors, yard brakemen, baggagemen and switchtenders. The two associations have jointly negotiated contracts with the railroad, and such a contract was jointly negotiated effective April 1, 1927, and remains in force with respect to road conductors, except as modified concerning rates of pay. April 18, 1941, the railroad notified the two unions of its desire to alter the contract and, pursuant to the notice, the accredited representatives of the parties

met in conference to adjust classifications of conductors, rates pay for them, and the control of the so-called "extra board" of conductors. Due to disagreements between the two unions at the concurrence by the railroad in the attitude of the trainmen representatives of the conductors withdrew from the joint negotiation and served notice of withdrawal on the railroad. Two weeks thereafter the railroad and the trainmen signed a new agreement covering the matters under consideration. Certain provisions agreed upon between the railroad and the trainmen were in violation of sections of the Railway Labor Act and, therefore, void, and the prior agreement between the conductors and the railroad remained in force, but, nevertheless, the railroad since execution of the new agreement with the trainmen, has refused to bargain with the plaintiff.

The railroad and the trainmen conspired and confederated an unlawful programme designed to embarrass, discredit, and weaken the plaintiff and strengthen the trainmen and thus to influence, coerce, and interfere with the craft of road conductors in their choice of a bargaining representative, and the railroad and trainmen were guilty of acts intended, and effective, to that end. September 23, 1942, the trainmen filed with the board a request to be certified as the bargaining representative of the craft of road conductors.

The plaintiff protested to the board against the holding of the election, charging that the railroad was interfering with, influencing, and coercing conductors by unlawfully bargaining with the trainmen with respect to road conductors' working conditions, in breach of the existing contract between the plaintiff and the railroad. The board illegally and wrongfully ruled that it had no jurisdiction to consider the charges, ordered an election to determine the bargaining representative for road conductors, held such election, and issued a certification based thereon that the trainmen was the authorized representative of the road conductors, which election and certification are illegal, null and void *inter alia*, because the board refused to perform its duties in investigating the alleged unfair labor practices.

Based on the foregoing allegations, the relief demanded was that the election and certification be annulled, vacated, and set aside; (2) (a) that the board and its members be restrained from holding any election for a bargaining representative of road conductors.

ductors until it shall have considered the unfair labor practices and found that they do not amount to interference, influence or coercion; and that (b), in the alternative, the court declare the practices complained of constitute unlawful interference or coercion of the craft of road conductors, and restrain the board from holding an election until the board determines, after investigation and hearing, that such interference, influence or coercion has ceased; (3) (4) that it be declared that certain paragraphs of the agreement negotiated by the railroad and the trainmen were not negotiated with the accredited representative of the road conductors and were illegal infringements upon the exclusive right of the plaintiff, as accredited bargaining agent, to represent the conductors; (5) that it be declared that the plaintiff, as such representative, has the exclusive right to negotiate in collective bargaining for the conductors; (6) that the railroad be permanently enjoined from bargaining or making or maintaining agreements with trainmen, or any other union except the plaintiff on behalf of road conductors so long as the plaintiff is the accredited representative of that class; (7) that the railroad be directed to negotiate and bargain with the plaintiff, as representative of the road conductors, so long as the plaintiff remains such representative; (8) that the railroad be enjoined from directly or indirectly coercing, influencing, or interfering with the craft of road conductors and their choice of a representative under the Railway Labor Act; (9) further relief.

After answers by the defendants the plaintiff moved for summary judgment on the pleadings and an affidavit which added nothing to the matters appearing in the pleadings. The District Court, though of opinion that there was no genuine issue, as to any material fact, presented under the motion for judgment, nevertheless denied the motion and also dismissed the complaint, because it held that the facts alleged and admitted failed to establish a cause of action.

The plaintiff appealed to the Court of Appeals for the District of Columbia. Each appellee filed a motion to dismiss on the ground that the court lacked jurisdiction. The motions were grounded on the decisions in *Switchmen's Union of North America v. National Mediation Board*, 320 U. S. 297 and related cases.¹

¹ General Committee of Adjustment, v. Missouri K. T. R. Co., 320 U. S. 323; Same v. Southern Pacific Co., 320 U. S. 338.

4. *Order of Ry. Conductors of America vs. P. R. R. Co. et al.*

which were announced after the appeal had been taken. The plaintiff answered the motions. The court, being of opinion that, under the rulings in the *Switchmen's Union* case and others decided at the same term,² it was without jurisdiction of the controversy, dismissed the appeal.³

The plaintiff applied to this court for certiorari to review the judgment dismissing the trainmen and the railroad. It did not seek review of the judgment granting the board's motion, and dismissing the board. That judgment is now final and beyond review here.

The plaintiff based its claims to relief on § 2 Third of the Railway Labor Act, which bans interference, influence, or coercion by either party in respect of designation of representatives by the other. The board, in denying jurisdiction, evidently relied on a portion of § 2 Ninth dealing with its function to investigate disputes concerning representation of employees, to hold elections, and to certify the authorized representative, as limiting its jurisdiction to the actual conduct of the investigation and election and precluding it from investigating prior action by any of the parties. The railroad relied upon § 2 Tenth, which it asserts creates remedies for violation of § 2 Third that are exclusive of all other remedies. The relevant portions of the sections thus relied on are quoted in the margin.⁴ The contentions so made raise important questions, but we express no opinion on them since, for reasons

² The court cited in addition to the cases relied on by the defendants, *Brotherhood v. United Transport Service Employees*, 320 U. S. 715.

³ 141 F. 2d 334.

⁴ Sec. 2 Third. "Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives." 45 U. S. C. § 152 Third.

Sec. 2 Ninth. "The Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier." 45 U. S. C. § 152 Ninth.

Sec. 2 Tenth. "The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor. . . . It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof." 45 U. S. C. § 152 Tenth.

about to be stated, we hold that we do not reach them within the framework of this case.

The first and second prayers for relief seek the annulment and cancellation of the board's certification and an injunction against board action. Plainly no such relief should be granted, if at all, in the absence of the board as a party. Because of the failure to appeal from the order dismissing it, the board is not, and never can be, a party to this cause, either here or in the courts below.

The third, fourth and fifth prayers in effect request a declaration that the plaintiff is the representative of the road conductors for bargaining notwithstanding the board's certification to the contrary. Since the election and certification could not be annulled without making the board a party, that result cannot be obtained by induction by having the court substitute itself for the board, or declare, independently of the board, who is the accredited representative of the plaintiff.

The sixth, seventh, and eighth prayers have a similar object. They ask an injunction to prevent the railroad from bargaining with tramps and a mandatory injunction that it shall bargain with the plaintiff as representative of road conductors. Such a decree would be in the teeth of the board's certification. To grant such a decree would seem to be in contravention of the *Swedish men's Union* case, *supra*, and in any event such action should not be taken in the absence of the board.

The eighth prayer seeks an injunction against future acts of the railroad coercive of the class of road conductors in choosing a bargaining representative. As we have seen, an election has been held, a representative chosen and the choice certified by the board. No election is now pending and there is no averment in the bill that an election is about to be held or that the railroad is about to commit any act in violation of the proscription of § 2 Third. All that the bill does is to recite what the railroad has heretofore done in advance of the election already held and the certification based upon it. No case is stated requiring the entry of the injunction prayed.

The arguments in this case covered a wide range and embodied suggestions as to possible remedies should the board act or refuse to act on charges of coercion antecedent to election and on possible remedies to deprive an employer guilty of influence and